Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

BILLY GROVES, individually, d.b.a. Savannah Re-Load,
SAVANNAH RE-LOAD, and
BRAMPTON ENTERPRISES, LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is a case about the delivery, use and possession of rail cars within the United States. The decision of the U.S. Court of Appeals for the Eleventh Circuit in this case is one of a growing number of conflicting court decisions which are having the practical effect of imposing rules for the delivery and possession of rail cars which differ sharply depending upon the location of delivery on the national rail system. And while this significant conflict continues to escalate, little attention has been given to the exclusive jurisdiction over this subject matter given by Congress to the U.S. Surface Transportation Board.

The source of the confusion turns on the disagreement between the Circuit Courts as to the proper definition of the word "consignee," a fundamental term which appears in every railroad's tariff regulating rail car use. To resolve this division of authority, the following questions are presented to this Court:

1. Whether "consignee" can be properly defined in railroad tariffs as the party named as consignee on a bill of lading that physically accepts delivery of all freight consigned to it, or whether the definition of "consignee" in such tariffs must also require proof that the party so named on the bill of lading explicitly consented to being named as consignee before accepting delivery, as required by the U.S. Court of Appeals for the Eleventh Circuit.

2. Whether this Court should resolve the conflicting definitions of "consignee" in the interest of uniformity in interstate commerce and follow the holding of the U.S. Court of Appeals for the Third Circuit, which comports with the traditional, commercial, regulatory and statutory definitions of "consignee."

3. Whether the courts have subject matter jurisdiction to interpret the terms or expand the requirements of a railroad's rail car demurrage tariff.

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

The caption of this petition contains the names of all the parties to the proceeding in the court below whose judgment is sought to be reviewed.

Petitioner, Norfolk Southern Railway Company ("NSRC"), the plaintiff-appellant below, is a non-governmental corporation which is a wholly owned subsidiary of Norfolk Southern Corporation ("NSC"). NSC is a non-governmental, publicly held corporation that holds 10% or more of NSRC's stock.

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OPINIONS AND ORDERS BELOW

The decision of the U. S. Court of Appeals for the Eleventh Circuit is reported at *Norfolk Southern Ry. Co. v. Groves*, 586 F.3d 1273 (11th Cir. 2009), and is reproduced in the Appendix ("App.") at 1a-21a. The Eleventh Circuit's order denying Norfolk Southern's timely petition for panel rehearing and/or rehearing *en banc* was issued January 7, 2010, and is reproduced at App. 35a-36a.

The decision of the U. S. District Court for the Southern District of Georgia is unpublished, but reported at *Norfolk Southern Ry. v. Groves*, Case No. CV 407-155, 2008 U.S. Dist. LEXIS 83286 (S.D. Ga. Sept. 15, 2008) and is reproduced at App. 22a-34a.

JURISDICTION

The Eleventh Circuit affirmed the decision of the district court granting summary judgment on November 2, 2009. A timely petition for panel rehearing and/or rehearing *en banc* was denied on January 7, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the decision of the Eleventh Circuit on a writ of certiorari.

RELEVANT PROVISIONS INVOLVED

49 U.S.C. § 10101

In regulating the railroad industry, it is the policy of the United States Government—

> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
>
> . . .
>
> (3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;
>
> (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
>
> (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
>
> . . .
>
> . . .

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9 to encourage honest and efficient management of railroads;

. . .

(12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;

49 U.S.C. § 10501(b)

(b) The jurisdiction of the Board over—

(1) Ttransportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) . . .

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10702

A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall establish reasonable—

(1) Trates, to the extent required by section 10707, divisions of joint rates, and classifications for transportation and service it may provide under this part; and

(2) rules and practices on matters related to that transportation or service.

49 U.S.C. § 10704

(a)

(1) When the Board, after a full hearing, decides that a rate charged or collected by a rail carrier for transportation subject to the jurisdiction of the Board under this part, or that a classification, rule, or practice of that carrier, does or will violate this part, the Board may prescribe the maximum rate, classification, rule, or practice to be followed. The Board may order the carrier to stop the violation. When a rate, classification, rule, or practice is prescribed under this subsection, the affected carrier may not publish, charge, or collect a different rate and shall adopt the classification and observe the rule or practice prescribed by the Board.

. . .

(d) Within 9 months after January 1, 1996, the Board shall establish procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates. The procedures shall include appropriate measures for avoiding delay in the discovery and evidentiary phases of such proceedings and exemption or revocation proceedings, including appropriate sanctions for such delay, and for ensuring prompt disposition of motions and interlocutory administrative appeals.

49 U.S.C. § 10741

(a)

(1) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part may not subject a person, place, port, or type of traffic to unreasonable discrimination.

(2) For purposes of this section, a rail carrier engages in unreasonable discrimination when it charges or receives from a person a different compensation for a service rendered, or to be rendered, in transportation the rail carrier may perform under this part than it charges or receives from another person for performing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances.

(b) This section shall not apply to—

(1) contracts described in section 10709 of this title;

(2) rail rates applicable to different routes; or

(3) discrimination against the traffic of another carrier providing transportation by any mode.

(c) Differences between rates, classifications, rules, and practices of rail carriers do not constitute a violation of this section if such differences result from different services provided by rail carriers.

49 U.S.C. § 10743(a)(1)

Liability for payment of rates for transportation for a shipment of property by a shipper or consignor to a consignee other than the shipper or consignor, is determined under this subsection when the transportation is provided by a rail carrier under this part. When the shipper or consignor instructs the rail carrier transporting the property to deliver it to a consignee that is an agent only, not having beneficial title to the property, the consignee is liable for rates billed at the time of delivery for which the consignee is otherwise liable, but not for additional rates that may be found to be due after delivery if the consignee gives written notice to the delivering carrier before delivery of the property—

(A) of the agency and absence of beneficial title; and

(B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.

49 U.S.C. § 10746

A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to—

(1) freight car use and distribution; and

(2) maintenance of an adequate supply of freight cars to be available for transportation of property.

49 U.S.C. § 80101(1)

In this chapter—

(1) "consignee" means the person named in a bill of lading as the person to whom the goods are to be delivered.

49 U.S.C. § 80110

(a) General Rules.—Except to the extent a common carrier establishes an excuse provided by law, the carrier must deliver goods covered by a bill of lading on demand of the consignee named in a nonnegotiable bill or the holder of a negotiable bill for the goods when the consignee or holder—

(1) offers in good faith to satisfy the lien of the carrier on the goods;

(2) has possession of the bill and, if a negotiable bill, offers to indorse and give the bill to the carrier; and

(3) agrees to sign, on delivery of the goods, a receipt for delivery if requested by the carrier.

(b) Persons to Whom Goods May Be Delivered.— Subject to section 80111 of this title, a common carrier may deliver the goods covered by a bill of lading to—

(1) a person entitled to their possession;

(2) the consignee named in a nonnegotiable bill; or

(3) a person in possession of a negotiable bill if—

(A) the goods are deliverable to the order of that person; or

(B) the bill has been indorsed to that person or in blank by the consignee or another indorsee.

. . .

Norfolk Southern's Tariff NS 6004-B[1]

ITEM 200 – GLOSSARY OF TERMS

FOR THE PURPOSE OF APPLYING PROVISIONS IN THIS PUBLICATION, THE FOLLOWING ARE DEFINED AND SHALL GOVERN:

. . .

6. **Consignee:** —The party to whom a shipment is consigned or the party entitled to receive the shipment.

* * *

ITEM 850 – DEMURRAGE PLAN

. . .

5. Demurrage charges will be assessed against the consignor at origin or the consignee at destination who will be responsible for payment.

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[1] These relevant provisions of the tariff were made a part of the record in the district court proceedings. Docket No. 46-6. All references to "Docket No." refer to docket entries on the district court's docket in *Norfolk Southern Ry. v. Groves*, Case No. CV-407-155 (S.D. Ga.).

STATEMENT OF THE CASE

In 2007, 563 freight railroads transported 2.26 billion tons of freight across the United States rail network.[2]

Remarkably this enormous amount of freight was transported using only 1.3 million rail cars, the majority of which are owned by either the freight railroads or the rail car leasing company which several rail carriers own jointly. [3] Rail cars are an essential but costly asset [4] of each railroad with limited durability.

To assure adequate rail car capacity sufficient to support the requirements of commerce, Congress has by statute required the nation's railroads to maintain and enforce tariffs which impose prescribed rail car demurrage charges against consignees who continue to possess their rail cars beyond the specified "free time" following delivery. 49 U.S.C. § 10746. Congress has also directed that the U.S. Surface Transportation Board (the "STB")[5] shall have exclusive jurisdiction to regulate

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[2] U.S. Freight Railroad Statistics, Association of American Railroads – Policy and Economics Department, June 10, 2009, p. 1, available at http://www.aar.org/Resources/Publications/Publications%20Landing%20Page.aspx, last visited March 22, 2010 ("Freight Railroad Statistics").

[3] *See id.*; *see also* http://www.ttx.com/TTXHome.aspx, last visited March 22, 2010 (The fleet of rail car leasing company TTX consists of more than 210,000 rail cars).

[4] See fn. 13-14, *infra*.

[5] The Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. § 10101 *et seq.*, overhauled the (Cont'd)

the content, interpretation, and application of the railroads' demurrage tariffs. 49 U.S.C. § 10501(b). The assurances of an adequate rail car supply to fulfill national needs has been deemed by Congress to be in the nation's best interest as a matter of commerce and security. 49 U.S.C. § 10746.

As the railroads have turned to the courts to enforce their ability to collect from consignees rail car demurrage which accrued under their tariffs, different U.S. Courts of Appeals have acknowledged their clearly conflicting rulings with respect to the application of such tariffs, and the definition of "consignee." *See CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247 (3d Cir. 2007), *cert denied*, 128 S. Ct. 1240 (2008); *cf. Norfolk Southern Ry. Co. v. Groves*, 586 F.3d 1273, 1280-81 (11th Cir. 2009) (acknowledging a conflict of authority among the Third, Seventh and Eleventh Circuits); *and cf. Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813 (7th Cir. 2003). The ruling by the U.S. Court of Appeals for the Eleventh Circuit in this case has left the nation's interline railroads with different rules and liabilities depending upon in which U.S. Circuit the delivering track is located.

In taking it upon itself to redefine the term "consignee," and expand the duties owed to a consignee,

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(Cont'd)

Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.* ("I.C.A." or "the Act"). Among other things, the revision eliminated the Interstate Commerce Commission ("ICC") and replaced it with the STB. *PCI*, *infra*, 418F.3d at 538. For the sake of consistency, 49 U.S.C. § 10101 *et seq.* will be referred to as the I.C.A. throughout in this petition.

the U.S. Court of Appeals for the Eleventh Circuit implicitly rejected the terms of the rail carrier's controlling tariff, and simply trampled over the exclusive jurisdiction, expertise, and prior rulings of the STB. The end result is a national interline rail system rendered disjointed by conflicting Circuit rulings applicable to the handling, possession and delivery of rail cars, and a specially created administrative agency, *i.e.*, the STB, which as a practical matter has been stripped of its capacity to regulate the application of rail tariffs.

This Court should grant certiorari to resolve whether the courts have subject matter jurisdiction to interpret and expand the requirements of railroad tariffs, as well as to restore uniformity in interstate commence by enforcing the statutory and traditional definition of "consignee" applied by the U.S. Court of Appeals for the Third Circuit.

Statutory Background

In accordance with Congressional mandate, the nation's rail network is operated subject to federal regulation by the STB.[6] The STB's mission under the Act is "to ensure the development and continuation of a sound rail transportation system to meet the needs of the public and the national defense." 49 U.S.C. § 10101(4). Congress also mandated all railroads to establish demurrage rules and charges so as to fulfill national needs for an adequate supply of freight cars, subject to the exclusive jurisdiction of the STB. 49 U.S.C. § 10501(b); 49 U.S.C. § 10746.

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[6] See fn. 5, *supra*.

Demurrage is a charge that both compensates rail carriers for the expenses incurred when rail cars are unreasonably detained at origin or destination, and serves as a penalty to encourage the speedy return of rail cars to the network.[7] In compliance with the statutory directive, each rail carrier has published a rail car demurrage tariff subject to the jurisdiction and approval of the STB. A party's obligation to pay demurrage arises out of the terms of a rail carrier's lawful establishment of such charges in a published tariff. *Unger*, 2000 STB LEXIS 333, *8.[8]

Petitioner Norfolk Southern Railway Company ("NSRC") established its own demurrage rules and charges in Tariff NS 6004-B ("the tariff") so as to comply with 49 U.S.C. § 10746. *Groves*, 586 F.3d at 1275–76. This public tariff provides that "[d]emurrage charges will be assessed against the consignor at origin or the **consignee** at destination who will be responsible for payment." *Id.* at 1276 (quotation in original) (*citing*

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[7] *R. Franklin Unger, Trustee of the Indiana Hi-Rail Corp., Debtor – Petition for Declaratory Order – Assessment and Collection of Demurrage and Switching Charges*, 2000 STB LEXIS 333, STB Docket No. 42030, *6 (STB served June 14, 2000) (*citing Chrysler Corp. v. New York C.R. Co.*, 234 I.C.C. 755, 759 (1939); *Capitol Materials, Inc. – Petition for Declaratory Order – Certain Rates and Practices of Norfolk Southern Railway Company*, 2004 STB LEXIS 227, STB Docket No. 42068, *3 (STB served April 12, 2004) (citation omitted); *South Tec Development Warehouse, Inc. and R.R. Donnelley & Sons Co. – Petition for Declaratory Order – Illinois Central Railroad Company*, 2000 STB LEXIS 666, STB Docket No. 42050, *6 (STB served November 13, 2000) (citation omitted).

[8] The first railroad National Demurrage Tariff was filed with the ICC in 1919. *Car Demurrage Rules*, 350 I.C.C. 777, *infra*.

Tariff, Item 850(5)) (emphasis supplied). The tariff defines consignee as "[t]he party to whom a shipment is consigned or the party entitled to receive the shipment." Tariff, Item 200(6). The Federal Bills of Lading Act, Black's Law Dictionary and the tariff define consignee in a consistent manner.[9] *Groves*, 586 F.3d at 1276 n. 3 (*citing* 49 U.S.C. § 80101(1) (1994) (*and citing Black's Law Dictionary*, p. 327 (8th ed. 2004).[10] The provision in the tariff assessing demurrage against the consignee at destination is consistent with the published demurrage tariffs of the other Class I railroads.[11]

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[9] The definition of consignee in the tariff is also consistent with the Uniform Commercial Code, ICC decisions and common usage. *Novolog*, 502 F.3d at 258 n. 11 (*citing* U.C.C. § 7-102(a)(3)); *Novolog*, 502 F.3d at 257 (*citing Webster's Third New International Dictionary* (1971)); *see also Merriam-Webster Online Dictionary*, 2009, retrieved November 17, 2009, from http://www.merriam-webster.com/dictionary/consignee; *Ametek, Inc. – Petition for Declaratory Order; Ametek, Inc. v. Panther Valley Railroad Corp., et al.*, 1993 ICC LEXIS 13, ICC Docket No. 40664, *16-17, 20-21 (ICC served January 29, 1993) ("*ICC Ametek*"); *and see Novolog*, 502 F.3d at 261 (recognizing the ICC's holding in *ICC Ametek*").

[10] *See also Black's Law Dictionary*, p. 307 (6th ed. 1990).

[11] Class I Railroads are the largest railroads, classified by revenue, as defined by the STB. *Norfolk Southern Ry. v. Consolidated Freightways Corp.*, 443 F.3d 1160, 1161 n. 1 (9th Cir. 2006) (*citing* 49 C.F.R. § 1201.1-1(a)). There are currently seven Class I railroads. *See* Class I Railroad Statistics, Association of American Railroads – Policy and Economics Department, September 10, 2009, p. 2, available at *http://www.aar.org/Resources/Publications/Publications%20Landing%20Page.aspx*, last visited March 22, 2010 ("Class I Railroad Statistics").

(Cont'd)

(Cont'd)

The demurrage tariffs of the Class I railroads are consistent with NSRC's tariff. Compare the following:

- Grand Trunk Corporation Tariff CN 6580-H, Item 800(F) ("Extended asset use charges will be assessed against the consignor at origin and consignee at destination") available at Uhttp://ecprod.cn.ca/ebusiness/eDistribution/english/public/DisplayPage?URL=PriceDocuments?s_icid=PriceDocs-feature-rght-pricedocsU, last visited April 1, 2010;

- Kansas City Southern Railway Company Demurrage and Storage Tariff KCS 6000-E, Item 110(G) ("Demurrage charges will be assessed against the consignor or consignee and they will be responsible for payment of such charges") available at http://www.kcsouthern.com/en-us/Customers/Documents/2009/09-11-09KCS6000ERevision7.pdf, last visited April 1, 2010;

- Soo Line Railroad Company Railcar Supplemental Services Tariff 2, Item 16 ("the Loader of the railcar is assessed at origin and the Un-loader of railcar is assessed at destination. The shipper and consignee will be held ultimately responsible should payment not be forthcoming from the Loader or Un-loader") available at Uhttp://www8.cpr.ca/cms/NR/rdonlyres/edhmk5s6z6zefgf3e6bk7ua6tns2apt7xgccsmje4q3cgpgoztv5hsuzxkp4fcucs2vv3kdltjk6utbld3ymfezxqub/Tariff+2++Railcar+Supplemental+Services++R2010.0.pdfU, last visited April 1, 2010;

(Cont'd)

Furthermore, the tariff has previously been held to be reasonable by the STB. *See Capitol Materials*, 2004 STB LEXIS 227.

Rail Car Shortages Are Cyclical and Frequently Result in National Emergencies

The most important purpose of demurrage, as stated by Congress in 49 U.S.C. § 10746, is to encourage the prompt return of rail cars to service so as to assure an adequate supply for the national rail system. *Novolog*, 502 F.3d at 259 (*citing*, *Pa.R.R.Co. v. Kittanning Iron & Steel Mfg. Co.*, 253 U.S. 319, 323, 40 S.Ct. 532, 64 L.Ed.

(Cont'd)

- CSX Transportation Tariff CSXT 8100, Item 8070(G) ("Unless otherwise advised, in WRITING, that another party is willing to accept responsibility for demurrage, consignor at origin or consignee at destination will be responsible for the payment of demurrage charges") available at Uhttp://www.csx.com/share/customers/tariff/docs/CSXT_8100_Demurrage_Provisions_Section_VIII_as_of_122002-REF10286.pdfU, last visited April 1, 2010;

- BNSF Railway Company BNSF Demurrage Book 6004-A, Item 1005K(F) ("Demurrage charges will be assessed against the consignor or consignee and they will be responsible for payment of such charges") available at Uhttp://newdomino.bnsf.com/website/prices.nsf/55abb888cb03db6286256d7100515608a107fd3ba598a27586257643004d1070/$FILE/Revision%2056.pdfU, last visited April 1, 2010.

928 (1920)). In its published ruling *Car Demurrage Rules, Nationwide*, 350 I.C.C. 777, 1975 I.C.C. LEXIS 52 (1975), the Interstate Commerce Commission ("ICC")[12] pointed out:

> Car shortages of varying duration and severity have been with us for decades and in every national emergency. They have incurred [*sic*] each year during periods of peak loadings and in about every producing area of the country.

Id., at 787 (citation omitted).

The nation's 563 freight railroads presently maintain a fleet consisting of approximately 1.3 million available rail cars.[13] The cars are heavily used and at various stages of age and repair. Not only are these rail cars a limited and overused commodity, they are a costly asset requiring significant capital to replace. "New freight cars cost between $70,000 and $260,000 depending on the type and features."[14] The average cost of a new freight car purchased by a Class I railroad in 2008 was $95,488.[15] If the flow of rail freight is to continue into the future without interruption, it is essential that rail cars be available for transportation of freight, and not improperly utilized by consignees for storage.

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[12] See fn. 5, *supra*.

[13] Freight Railroad Statistics, p. 1.

[14] Class I Railroad Statistics, p. 2.

[15] *Id.*

Rail Cars at Issue

NSRC delivered rail cars loaded with freight to respondent, Brampton Enterprises, LLC's ("Brampton") facility in Savannah, Georgia in 2007. *Groves*, 586 F.3d at 1275. The various bills of lading for the freight contained within the rail cars all named Brampton as the sole consignee. *Id.* at 1276. Brampton accepted delivery of the rail cars, and never provided NSRC with any written notice disclosing that it was serving as an agent for other principals. Brampton failed to unload and return the railcars to NSRC within the free time allowed by NSRC's tariff, and consequently Brampton accrued demurrage charges under the terms of NSRC's tariff. *Id.* at 1275. None of the aforementioned facts are in dispute. *Id.* at 1275-77.

Brampton admits that it was the named consignee on the bills of lading, and does not contend that it provided NSRC with notice that it was an agent for any disclosed principals. *Id.* at 1276. Brampton contends only that it never agreed with any shippers to be named as consignee, nor did it receive written notice prior to delivery that it was named as consignee on the various bills of lading. *Id.*

Proceedings Below

NRSC filed this lawsuit against Brampton to recover rail car demurrage charges which accrued under the terms of its governing tariff. NSRC's Amended

Complaint ("Amended Complaint"), Docket No. 41, ¶ 8.[16] Brampton's sole defense to the claim was that it never agreed with any shipper to be named as the consignee on the bills of lading, and never received notice prior to delivery that it was named as consignee on the bills of lading. *Groves*, 586 F.3d at 1276.

The district court granted Brampton's motion for summary judgment, holding that, notwithstanding the definition provisions of NSRC's tariff, Brampton could not be a true consignee unless it could be proven that Brampton consented to being named consignee, or had notice prior to delivery that it was named as consignee. *Id.* at 1282.

On appeal, the Eleventh Circuit affirmed and adopted the ruling of the district court. *Id.* The Eleventh Circuit conceded that its ruling directly conflicted with a ruling of the Third Circuit, but principally relied on decisions which only discussed the liability of disclosed agents named as consignee. *Id.* at 1280-81.

Jurisdiction of the Courts Below

NSRC seeks review of the decision of the Eleventh Circuit. The Eleventh Circuit had jurisdiction over this matter pursuant to 28 U.S.C. § 1291, as a timely appeal was filed by NSRC. The district court had jurisdiction over the claims pled in this case pursuant to 28 U.S.C.

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[16] 8. The assessed demurrage charges were determined and made applicable pursuant to tariffs, rules and rates promulgated and published in accordance with 49 U.S.C. § 10746." Amended Complaint, ¶ 8.

§ 1337 as a cause of action arising under the I.C.A., 49 U.S.C. §§ 10101 *et seq.* The Eleventh Circuit and district court possessed subject matter jurisdiction to apply the unambiguous terms of the tariff and to resolve questions of fact relating to the application of the tariff. However, to the extent that the Eleventh Circuit's decision has the effect of interpreting and/or reforming the terms of the tariff, the Eleventh Circuit's remedy raises an interesting jurisdictional issue. Matters of tariff interpretation, extrapolation, and reformation are reserved to the exclusive jurisdiction of the STB.

REASONS FOR GRANTING THE PETITION

Congress clearly stated that it is the United States Government's policy "to ensure the development and continuation of a sound rail transportation system to meet the needs of the public and the national defense." 49 U.S.C. §10101(4). The Courts have stressed the need for uniformity with respect to the costs and liabilities for national rail freight transportation. *Pittsburgh, C.C., & St. Louis Ry. Co. v. Fink*, 250 U.S. 577, 40 S.Ct. 27, 63 L.Ed. 1151 (1919). Consistency and uniformity result in the nondiscriminatory treatment of rail customers, and assure that the nation's 563 different freight railroads operate as one system.

Congress, as part of these same policy objectives, has also stressed the essential need for an adequate supply of rail cars to assure continuous operation of a national rail system. To this end, Congress has required the railroads to collect demurrage pursuant to tariffs

to promote rail car efficiency, and to avoid having rail cars sidelined as storage facilities.[17]

This case presents a critical issue which the Circuit Courts have considered and issued diametrically opposed rulings on. This conflict threatens to fractionalize the operation of a uniform national system into a rail system of geographic circuits, where the rules of liability and rail car handling differ and vary depending upon the location of the rail cars. Moreover, the decision of the Eleventh Circuit will result in a profoundly different set of rules and obligations for rail deliveries made within this particular Circuit, as rail carriers there now have the additional burden of investigating and confirming the identity of the true and consenting consignee before delivering loaded rail cars – but only for deliveries made within this particular Circuit.

This case also presents important questions of subject matter jurisdiction, as the Eleventh Circuit's

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[17] *See Novolog*, 502 F.3d at 259 (*citing Kittanning*, 253 U.S. at 323) (the most important purpose of demurrage is to encourage the prompt return of freight cars to service so as to guarantee the steady flow of rail freight). Congress's concern with ensuring that rail cars be available for transportation and not sidelined or improperly used as storage facilities is reflected in 49 U.S.C. § 10746 which requires rail carriers to compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to — (1) freight car use and distribution; and (2) maintenance of an adequate supply of freight cars to be available for transportation of property. *Novolog*, 502 F.3d at 259-60; *Groves*, 586 F.3d at 1276 (*citing* 49 U.S.C. § 10746).

decision is the clear result of the court's interpretation and expansion of the terms of a rail carrier's tariff, notwithstanding the express and exclusive jurisdiction afforded to the STB by Congress.

A. This Court Should Grant the Petition in Order to Resolve the Direct Conflict Between the Decisions of the Third and Eleventh Circuits Which Threatens to Transform a National Rail System into a Rail System of Different Circuits

The Eleventh Circuit recognized and announced that its holding was directly at odds with the holding of the U.S. Court of Appeals for the Third Circuit in *Novolog. Groves*, 586 F.3d at 1280-81. Thus, if Brampton was physically located in the Third Circuit, it would be liable for the rail car demurrage claimed in this case.

The Third Circuit interpreted § 10743(a)(1)[18] as providing that "the named consignee [on a bill of lading] becomes a party to the transportation contract upon receipt of the freight and is thereafter liable for all relevant charges." *Novolog*, 502 F.3d at 255-56. The Third Circuit identified three reasons for reaching this holding. *Id.* at 257-59. The Eleventh Circuit's decision re-states those three reasons but rejects the ultimate

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[18] Section 10743(a)(1) provides consignees identified on a bill of lading a defense to liability for demurrage charges. Brampton does not claim that the statutory defense provided by § 10743 is applicable in this case. The particulars of the defense are discussed in fn. 25, *infra*.

conclusion without discussion of the Third Circuit's reasons or application of those reasons to the facts in this case. *Groves*, 586 F.3d at 1280-81. The Eleventh Circuit summarily rejected the Third Circuit's analysis and held that "the *Novolog* rule of presumptive liability cannot function in a situation where the receiver of freight is not given notice that it has been listed as a consignee by third parties." *Id.* at 1281. The Eleventh Circuit inexplicably failed to mention the fact that there is no evidence that the consignee in *Novolog* received such notice as it: (1) did not assent to being named consignee in the bills of lading, and; (2) did not prepare any of the bills. *Novolog*, 502 F.3d at 252, 254, 256, 257. Thus, the Eleventh and Third Circuits reached opposite legal conclusions regarding demurrage liability under nearly identical facts. The parties alleged to be liable for demurrage in each case: (1) did not have a beneficial ownership interest in the freight at issue; (2) were identified as consignee on the relevant bills of lading; (3) did not prepare those bills of lading; (4) did not consent to being named as consignee on the bills of lading, and; (5) did not give notice to the rail carrier that they were acting as an agent only.

The consignee in *Novolog* petitioned this Court for issuance of a writ of certiorari following the Third Circuit's decision. 128 S. Ct. 1240 (2008). The *Novolog* consignee argued that there was a conflict between the *Novolog* decision and the law of another Circuit citing the Seventh Circuit's decision in *Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813 (7th Cir.

2003).[19] While that argument alleging a conflict among the Circuits on this important issue certainly proved to be prescient, the conflict was simply percolating at that point. Now, however, a true and compelling conflict does exist. The matter is ripe for resolution by this Court, and resolution is warranted.

This Court recognized that: "The purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars. The duty of loading and of unloading carload shipments rests upon the shipper or consignee." *Kittanning*, 253 U.S. at 323. The rationale behind the policy is clearly to avoid rail car shortages when shippers present increasing demands upon rail carriers. *See Car Demurrage Rules*, 350 I.C.C. 777. The ICC has repeatedly dealt with cyclical rail car shortages, and pointed out: "Car shortages of varying duration and severity have been with us for decades and in every national emergency." *Id.* (Citation omitted).

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[19] The Eleventh Circuit noted a conflict of authority on the issue presented herein between the Third and Seventh Circuits. *Groves*, 586 F.3d at 1280. Both *Novolog* and the Eleventh Circuit's decision discuss the Seventh Circuit's decision in *South Tec*. The Court in *South Tec* analyzed a demurrage dispute and posed the question of whether a warehouseman was a consignee. *South Tec*, 337 F.3d at 817, 820. The Eleventh Circuit acknowledges that the Seventh Circuit never answered this question. *Groves*, 586 F.3d at 1280. In fact, the Seventh Circuit remanded the question to the district court for resolution. However, the question was never answered as the matter was settled following remand. While the Seventh Circuit's treatment of the issue signaled a prelude to the current division of authority, it failed to resolve the issue and thus stopped short of creating a Circuit split.

Should the current conflict be allowed to over-ripen, the effect on the rail freight transportation network could be costly to industries across the economic landscape. Rail carriers will not be compensated for use of their assets and opportunities to transport the goods of others will be lost. Named consignees who deny consenting to be so named will have no incentive to return rail cars promptly, and will be at liberty to misuse them as free storage facilities. Like the rail carriers, other companies relying on the rail transportation network will be at the mercy of "non-consenting" consignees [20] in some, but not all Circuits. The statutory objective of ensuring that rail cars are efficiently and properly utilized will have failed, but only in certain locations.

The Circuit split created by the Eleventh Circuit's decision undermines the intended uniformity of interstate commerce. Notwithstanding clear Congressional intent to abolish disparate treatment of entities in identical factual circumstances, this is precisely what is evolving from the conflicting rulings. [21]

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[20] Whether the shippers' agent who may have identified Brampton as the consignee on the bills of lading is liable, in turn, to Brampton for misidentifying it as consignee, or under the terms of their contractual relationship, is a separate question.

[21] Providing identical services at different rates for different customers is prohibited by the I.C.A. Section 10741(a) provides that a "rail carrier . . . may not subject a person, place, port, or type of traffic to unreasonable discrimination. . . . For purposes of this section, a rail carrier engages in unreasonable discrimination when it charges or receives from a person a (Cont'd)

The Eleventh Circuit's decision results in a judicial failure to provide parties to transactions involving interstate commerce with clear, easily enforceable rules, particularly with respect to rail car use and possession. *Novolog*, 502 F.3d at 257, 258. The conflicting duties, responsibilities and liability imposed by the Eleventh Circuit's decision here, and the Third Circuit's decision in *Novolog*, result in a situation where rail users receiving identical services under identical circumstances will be subject to different liabilities, or rail carriers providing identical services will bear different burdens in order to collect identical charges. The Eleventh Circuit's decision thus constitutes a departure from the accepted and usual course of judicial proceedings, and calls for an exercise of this Court's power to resolve the Circuit split on this important question.

B. This Court Should Grant the Petition Because the Eleventh Circuit Did Not Have Jurisdiction to Render a Decision That Interprets the Provisions of a Rail Carrier's Demurrage Tariff

The claim asserted by NSRC in the district court presented a single, straightforward question: is Brampton liable for demurrage under NSRC's tariff? Amended Complaint, ¶ 8.

(Cont'd)
different compensation for a service rendered, . . . than it charges or receives from another person for performing a like and contemporaneous service . . . under substantially similar circumstances." 49 U.S.C. § 10741(a).

The provisions of the tariff are not in dispute. "Demurrage charges will be assessed against the consignor at origin or the consignee at destination who will be responsible for payment." Tariff, Item 850 (5); *Groves*, 586 F.3d at 1276. When used in the tariff, the term "consignee" means "[t]he party to whom a shipment is consigned or the party entitled to receive the shipment." Tariff, Item 200 (6). Federal statutory law, decisional law of courts, decisions promulgated by the STB and its predecessor the ICC, as well as commercial practice and common usage all define consignee in a manner consistent with the tariff. *See Groves*, 586 F.3d at 1276 n. 3.[22] The Eleventh Circuit's novel definition of consignee which requires proof of consent before delivery is irreconcilable with historical, legal and commercial practice and precedent.

The relevant facts are not in dispute. Brampton was named as the consignee on the bills of lading relating to the shipments at issue. *Id.* at 1276. The demurrage at issue accrued at rail destination – namely, Brampton's facility. *Id.* at 1275. As to the shipments at issue, it is undisputed that Brampton received and accepted all of the rail cars loaded with freight. Accordingly, applying the plain and literal terms of the tariff, Brampton is liable for demurrage accruing after delivery.

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[22] *See* 49 U.S.C. § 80101(1); *and see Black's Law Dictionary*, p. 327 (8th ed. 2004); *and see Black's Law Dictionary*, p. 307 (6th ed. 1990); *and see Novolog*, 502 F.3d at 257 (*citing Webster's Third New International Dictionary* (1971)); *and see Novolog*, 502 F.3d at 258 n. 11 (*citing* U.C.C. § 7-102(a)(3)); *and see Novolog*, 502 F.3d at 262; *and see ICC Ametek*, 1993 ICC LEXIS 13, *16-17, 20-21; *and see Merriam-Webster Online Dictionary*. 2009. Retrieved November 17, 2009, from http://www.merriam-webster.com/dictionary/consignee.

To the extent that questions are raised regarding the enforceability or reasonableness of the terms of any rail carrier's tariff,[23] those questions fall exclusively within the jurisdiction of the STB. [24] Where demurrage is assessed pursuant to a tariff, it is subject to Board regulation under 49 U.S.C. § 10702. *PCI Transp.*, 2008 STB LEXIS 218, *1; *South Tec*, 2000 STB LEXIS 666, *6-7; *see Capitol Materials*, 2004 STB LEXIS 227, *3; *see also Unger*, 2000 STB LEXIS 333, *6. Even the Eleventh Circuit recognized that the assessment of demurrage charges and issuance of demurrage rules by rail carriers is "subject to oversight by the Surface Transportation Board." *Groves*, 586 F.3d at 1276; 49 U.S.C. § 10501(b).

It is clear that Congress intended for a broad grant of jurisdiction to the STB over railroad transportation

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[23] Notably, the STB has previously held that the rate of demurrage charged and the method of calculating demurrage under the tariff at issue here, *i.e.*, Tariff NS 6004-B, is reasonable under 49 U.S.C. § 10702. *Capitol Materials*, 2004 STB LEXIS 227, *9-10. Equally notable is the fact that the rail user who challenged the tariff in *Capitol Materials* accrued demurrage under the tariff at a facility located in the Eleventh Circuit (*i.e.*, Fulton County, Georgia).

[24] 49 U.S.C. § 10501(b); *PCI Transp., Inc. v. Fort Worth & Western R.R. Co.*, 418 F.3d 535, 538, 540 (5th Cir. 2005); *see also Illinois Central R.R. v. South Tec Development Warehouse*, No. 97 C 5720, 1999 U.S. Dist. LEXIS 11222,* 4-6 (N.D. Ill. July 16, 1999) (*citing U.S. v. Western Pac. R.R.*, 352 U.S. 59, 63, 77 S. Ct. 161, 1 L. Ed. 2d 126(1956); *and see PCI Transportation, Inc. v. Fort Worth & Western R.R. Co.*, 2008 STB LEXIS 218, STB Docket No. 42094 (Sub-No. 1), *10-11 (STB served April 25, 2008).

and rail carriers. *See CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996). It is equally clear that 49 U.S.C. § 10501 provides that the STB's jurisdiction over rules regarding rail car demurrage established by rail carriers under the I.C.A. is exclusive. *See* fn. 24, *supra*. The exclusivity of the STB's jurisdiction is warranted due to the fact that the STB is "uniquely qualified" to resolve such issues. *South Tec*, 1999 U.S. Dist. LEXIS 11222, * 5.[25]

The Eleventh Circuit held that Brampton was not a consignee, and therefore not liable for demurrage. Based upon the claim asserted by NSRC, the Eleventh Circuit's decision can only be understood as holding that Brampton was not a consignee as that term is used in the tariff, and therefore not liable for demurrage. [26] By

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[25] In *Novolog*, the Third Circuit held that the STB's jurisdiction is primary, as opposed to exclusive, when demurrage charges are assessed "under an agreement – namely, the transportation contract." *Novolog*, 502 F.3d at 250, 252-53. When demurrage is assessed under a tariff, the STB's jurisdiction is exclusive, rather than simply primary. *See* fn. 24, *supra*. Objections to subject matter jurisdiction based upon an argument that the STB's jurisdiction is exclusive can be raised at any point. *Novolog*, 502 F.3d at 253 (*citing Northwest Airlines v. County of Kent*, 510 U.S. 355, 366 n. 10, 114 S. Ct. 855, 127 L. Ed. 2d 183 (1994)) (further citations omitted).

[26] There are two defenses that would render Brampton, or any consignee identified on a bill of lading, not liable for demurrage notwithstanding the terms of the tariff. Neither, however, is applicable in this case. First, Brampton could have refused to accept delivery of the freight. *See Groves*, 586 F.3d at 1280; *Novolog*, 502 F.3d at 259. Here, it is undisputed that

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issuing a decision which expressly, or implicitly, interprets the terms of the tariff, the Eleventh Circuit infringed upon the exclusive jurisdiction of the STB and rendered a judgment beyond its power.

C. The Eleventh Circuit's Decision Imposes an Unclear and Unworkable Rule Upon the Interstate Rail Network and Constitutes a Departure from the Accepted and Usual Course of Judicial Proceedings Which Calls for an Exercise of This Court's Power

The Eleventh Circuit's novel definition of consignee leaves carriers with different rules which vary by location of delivery. Worse yet, the rules for demurrage in the Eleventh Circuit are now, as a practical matter, unworkable.

(Cont'd)
Brampton accepted delivery of the freight. Second, an entity identified as a consignee on a bill of lading who accepts delivery of freight is not liable for demurrage accrued at rail destination if: (1) the consignee is an agent only, not having beneficial title to the property, and; (2) the consignee gives written notice to the delivering carrier before delivery of the property of the agency and absence of beneficial title and the name and address of the beneficial owner of the property. 49 U.S.C. § 10743(a)(1); *Novolog*, 502 F.3d at 259; *Groves*, 586 F.3d at 1279. It is not disputed that Brampton: (1) is identified as the consignee on the bills of lading at issue; (2) accepted delivery of the rail cars at issue, and; (3) did not provide NSRC written notice prior to delivery asserting that Brampton was an agent without beneficial title to the freight. Accordingly, neither of the defenses available to Brampton is even alleged to be applicable in this case. Thus, the Eleventh Circuit's opinion must be construed as holding that Brampton is not liable under the tariff because it is not a consignee, regardless of the tariff's terms.

In practice, there is no reason for any party who accepts delivery of freight to expressly admit that they consent to being identified as the consignee on a bill of lading. A rail carrier has no choice but to deliver freight to the party named on a bill of lading as consignee. *Novolog*, 502 F.3d at 259. The named consignee can accept delivery of the freight and then take the position that it did not consent to being "named" consignee, and retain possession of the rail cars for storage purposes. This would leave the rail carriers with no one to charge with demurrage at destination, as is the case here, and no entity being qualified to be the consignee.

Under the Eleventh Circuit's rule, if a named consignee claims that it did not consent to being so named, the burden shifts to the rail carrier to prove that party consented in advance to being named as consignee on the bill of lading. This would presumably be accomplished by having the railroad physically serve the consignee with notice and obtain acceptance before delivery.[27] However, charging rail carriers with the obligation of notifying receivers of their designation as consignee before making delivery proves equally problematic.

There are two types of bills of lading: negotiable (formerly order) bills of lading and nonnegotiable (formerly straight) bills of lading. 49 U.S.C. § 80103. Both types of bills are given to the railroad by the

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[27] In the 21st century, rail carriers typically do not receive or maintain paper bills of lading; the shipper typically notifies the rail carrier electronically of the consignee's identity and location.

consignee at delivery. Negotiable bills of lading grant the **holder** the right to take possession of the freight identified therein. 49 U.S.C. § 80110(b)(3) (emphasis supplied). Like a dry cleaning ticket, the negotiable bill of lading is traded for possession of the goods. Even with nonnegotiable bills of lading, a "carrier must deliver goods covered by a bill of lading on demand of the consignee named in a nonnegotiable bill . . . when the consignee . . . (1) offers . . . to satisfy the lien of the carrier on the goods; (2) **has possession of the bill** . . . ; and (3) agrees to sign, on delivery of the goods, a receipt for delivery." 49 U.S.C. § 80110(a) (emphasis supplied). Thus, in addition to running upstream of centuries of commercial practice, forcing a rail carrier to provide copies of a bill of lading to a consignee before delivery has practical and legal obstacles. With respect to negotiable bills, the carrier, like the analogous dry cleaner above, waits for the customer/consignee to produce its copy of the bill of lading before surrendering possession of the goods. With respect to nonnegotiable bills, the law presupposes that the consignee "has possession of the bill" before delivery is made. A rule which obligates the carrier to supply the consignee with the bill of lading prior to delivery quite literally turns the law on its head.

In addition to the practical and legal problems engendered by the Eleventh Circuit's novel definition of consignee, the definition is at odds with definitions found in, *inter alia*:

- the tariff at issue which has previously been subjected to review by the STB ("[t]he party to whom a shipment is

consigned or the party entitled to receive the shipment");[28]

- *Novolog* ("an entity named on a bill of lading as the sole consignee, without any designation clearly indicating any other role, is presumptively liable for demurrage fees on the shipment to which that bill of lading refers");[29]

- the Federal Bill of Lading Act ("the person named in a bill of lading as the person to whom the goods are to be delivered");[30]

- ICC decisions regarding demurrage liability;[31]

- the Uniform Commercial Code ("a person named in a bill of lading to which or to whose order the bill promises delivery");[32]

- Black's Law Dictionary ("[p]erson named in bill of lading to whom or to whose order

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[28] Tariff NS 6004-B, Item 200(6); *see Capitol Materials*, 2004 STB LEXIS 227.

[29] *Novolog*, 502 F.3d at 262.

[30] 49 U.S.C. § 80101(1).

[31] *ICC Ametek*, 1993 ICC LEXIS 13, *16-17, 20-21.

[32] *Novolog*, 502 F.3d at 258 n. 11 (*citing* U.C.C. § 7-102(a)(3)).

the bill promises delivery")[33] and ("[o]ne to whom goods are consigned");[34]

- common usage ("one to whom something is consigned or shipped");[35] and even,

- dicta in the Eleventh Circuit's own decision ("[a]s previously defined, a consignee is the party designated to receive a shipment of goods").[36]

The consistency of the definitions provided by the sources above is striking. However, these similarities are not surprising given Congress' stated intent of uniformity and consistency in matters relating to interstate rail transportation. Assuming *arguendo* that it was within the Eleventh Circuit's jurisdiction to create its own novel definition of consignee for purposes of determining Brampton's liability for demurrage under the tariff, the definition created by the Eleventh Circuit fails to even define who is a consignee. It merely defines who may not be a consignee. Thus, the novel definition promulgated by the Eleventh Circuit fails to provide a "clear, easily enforceable" rule as required by the I.C.A. *Novolog*, 502 F.3d at 257, 258.

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[33] *Black's Law Dictionary*, p. 307 (6th ed. 1990).

[34] *Black's Law Dictionary*, p. 327 (8th ed. 2004).

[35] *Novolog*, 502 F.3d at 257 (*citing Webster's Third New International Dictionary* (1971)); *Merriam-Webster Online Dictionary*. 2009. Retrieved November 17, 2009, from http://www.merriam-webster.com/dictionary/consignee.

[36] *Groves*, 586 F.3d at 1281.

The rejection of consistent, widely accepted definitions of consignee within the Eleventh Circuit destroys the uniformity and consistency in matters relating to interstate rail transportation. The Eleventh Circuit's decision thus creates a Circuit split and constitutes a departure from the accepted and usual course of judicial proceedings which calls for an exercise of this Court's power with respect to resolution of this important question.

CONCLUSION

The Eleventh Circuit has decided an important question of federal law that has not been, but now must be, settled by this Court. The Eleventh Circuit readily acknowledges that its decision directly conflicts with a recent decision of the Third Circuit. If permitted to stand, the Eleventh Circuit's decision will result in a disjointed and regional freight rail system, instead of the national rail system mandated by Congress. Furthermore, it is highly questionable that the Eleventh Circuit possessed jurisdiction to render the decision as issued. Accordingly, petitioner respectfully requests that this Court issue a writ of certiorari to the U.S. Court of Appeals for the Eleventh Circuit in this matter and either vacate or reverse the decision of the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED NOVEMBER 2, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-15418

NORFOLK SOUTHERN RAILWAY COMPANY,

Plaintiff-Appellant,

versus

BILLY GROVES, individually, d.b.a. Savannah Re-Load, SAVANNAH RE-LOAD, et al.,

Defendants,

BRAMPTON ENTERPRISES, LLC, d.b.a. Savannah Re-Load,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Georgia

(November 2, 2009)

Appendix A

Before CARNES, FAY and ALARCÓN,* Circuit Judges.

FAY, Circuit Judge:

This appeal arises from a dispute between a rail carrier and a warehouseman regarding liability for demurrage, *i.e.*, penalties assessed for the undue detention of rail cars. Norfolk Southern Railway Company sued Brampton Enterprises, LLC d/b/a Savannah Re-Load for demurrage accrued over the six month period from March to August 2007. Savannah Re-Load denied liability for the demurrage charges and, despite being named as consignee on the bills of lading, maintained it was not a party to the shipping contracts. Norfolk Southern asserts that as the named consignee Savannah Re-Load became a party to the contracts by accepting the shipments. The district court granted summary judgment in favor of Savannah holding that a freight re-loader cannot, without notice, be made a consignee by the unilateral action of a third party. We affirm.

I.

Brampton Enterprises operates a warehouse business under the trade name Savannah Re-Load ("Savannah"). As a warehouseman, Savannah receives freight at its facility, unloads it from the containers in which it arrives, reloads it into appropriate containers

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* Honorable Arthur L. Alarcón, United States Circuit Judge for the Ninth Circuit, sitting by designation.

for export, and forwards it to various ports according to instructions received from the freight forwarder. Savannah has no ownership interest in the freight it handles and is not a party to the transportation contracts. The freight forwarding companies make transportation arrangements without input from or notice to Savannah.

In late 2006 Galaxy Forwarding ("Galaxy") began sending freight to Savannah's facility via railcar delivered by Norfolk Southern Railway Company ("Norfolk"). According to Savannah owner William "Billy" Groves, Galaxy was aware of Savannah's operational capacity and controlled the amount of freight it received. Galaxy merely informed Savannah when shipments were en route and provided it with instructions regarding the export of the shipment. Galaxy was the only freight forwarder to send Savannah freight via rail and arranged transportation for all the freight shipments at issue. These freight shipments originated from various domestic shippers and were being exported to overseas recipients by Galaxy. Savannah had no knowledge of the origins or final destinations of the freight it handled.

Norfolk transported the rail freight to Savannah pursuant to bills of lading[1] received from Galaxy. Before

1. A bill of lading is "the basic transportation contract between the shipper-consignor and the carrier; its terms and conditions bind the shipper and all connecting carriers." *Southern Pac. Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 342, 102 S. Ct. 1815, 1820, 72 L. Ed. 2d 114 (1982).

rail cars were delivered, Norfolk would notify Savannah that rail cars from certain shippers had arrived and were ready for delivery. Once Savannah approved the delivery, Norfolk would perform a "switch" by removing any empty rail cars and replacing them with new rail cars to unload. Norfolk would perform only one "switch" per day delivering as many as five cars at a time.

Beginning in March 2007, Galaxy began sending rail freight to Savannah at such a volume that demurrage began to accrue. Pursuant to Norfolk's tariff, a customer is allowed two days to unload freight without incurring demurrage. At the end of each month, a customer's total demurrage days are netted against total credits. Credits are calculated by multiplying the number of rail cars delivered during a particular month by two, which accounts for the two "free" days all customers are given to unload delivered rail cars. If total demurrage exceeds total credits, those days are charged at the daily rate published in Norfolk's tariff.

The right to assess detention or demurrage charges against parties to a transportation contract for delay in releasing transportation equipment is well established at common law. Motor carriers term such a delay as detention while rail carriers refer to it as demurrage. Prior to rail transport, demurrage was recognized in maritime law as the amount to be paid for delay in loading, unloading, or sailing beyond the time specified. Unlike maritime law, a railroad carrier can collect demurrage even if the shipping contract contains no provision to that effect. In the railroad setting,

demurrage charges serve a twofold purpose: "One is to secure compensation for the use of the car and of the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention." *Turner, Dennis & Lowry Lumber Co. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 271 U.S. 259, 262, 46 S. Ct. 530, 531, 70 L. Ed. 934 (1926). As such, demurrage charges are properly assessed even if the cause for the delay is beyond the party's control, unless the carrier itself is responsible for the delay.

While demurrage remains a matter of contract, railroads are now required by federal statute to assess demurrage charges subject to oversight by the Surface Transportation Board. Norfolk seeks demurrage charges against Savannah pursuant to the Interstate Commerce Commission Termination Act (ICCTA), requiring rail carriers to "compute demurrage charges, and establish rules related to those charges . . ." 49 U.S.C. § 10746 (1995). Norfolk publishes the applicable demurrage rules and charges in Freight Tariff NS 6004-B, which states in relevant part that "[d]emurrage charges will be assessed against the consignor[2] at origin or consignee[3] at destination who will

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2. A consignor is "[o]ne who dispatches goods to another on consignment." Black's Law Dictionary 327 (8th ed. 2004). A consignment is "[a] quantity of goods delivered by this act, esp. in a single shipment." Black's Law Dictionary 327 (8th ed. 2004).

3. A consignee is "[o]ne to whom goods are consigned." Black's Law Dictionary 327 (8th ed. 2004). The Federal Bills of

(Cont'd)

be responsible for payment." Tariff NS 6004-B, Item 850(5) (2000) (footnotes added). Thus, Norfolk is required by the ICCTA and the terms of its own tariff to assess demurrage charges against the shipment's consignee for any delay in unloading the rail cars at their destination.

Savannah was a named consignee on the bills of lading for the freight shipments at issue. However, many of these bills of lading also named an ultimate consignee and printed copies of the electronic bill of lading data submitted by Norfolk did not actually contain the word consignee. Savannah maintains that it did not consent to being named on the bills of lading and was never informed that any bill of lading identified it as a consignee. The record indicates that neither Galaxy, Norfolk, nor any other entity provided Savannah with the bills of lading for the freight it handled. Thus, Savannah was a named consignee on the bills of lading without notice of, or consent to, such designation.

In addition to the freight at issue in this appeal, Norfolk routinely delivered freight to Savannah's facility pursuant to bills of lading where Savannah was not the

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(Cont'd)

Lading Act and Norfolk's Tariff define consignee in a consistent manner. *See* 49 U.S.C. § 80101(1) (1994) ("'consignee' means the person named in a bill of lading as the person to whom the goods are to be delivered"); Tariff NS 6004-B, Item 200(6) (2000) ("The party to whom a shipment is consigned or the party entitled to receive the shipment").

named consignee. The instant dispute arose when Norfolk began invoicing Savannah for demurrage on all shipments delivered to Savannah's facility irrespective of whether Savannah was the named consignee. Savannah refused to pay and in late 2007 Norfolk sued for demurrage on all shipments, without regard for who was named as consignee. After Savannah moved for summary judgment, Norfolk amended its complaint, to exclude demurrage for freight shipments where Savannah was not named as consignee. This amendment had the effect of reducing Norfolk's demand from $ 133,080.00 to $ 70,680.00.

In early 2008 Savannah moved for summary judgment on all claims arguing that it was not liable for demurrage because Norfolk could "only recover demurrage against a consignee or a party to the transportation contract." Savannah stated that "the issue before the Court is whether another's unilateral act of identifying 'Savannah Re-Load' as the consignee without [its] knowledge or permission is sufficient to make it a consignee and therefore liable for demurrage." Norfolk moved for partial summary judgment as to the issue of Savannah's liability for demurrage. Norfolk argued that Savannah was liable for demurrage because Savannah was identified as consignee on the bills of lading at issue, Savannah accepted delivery of the rail cars and the freight, and Savannah did not notify Norfolk of its agent status.

The district court granted Savannah's motion for summary judgment and denied Norfolk's motion for

partial summary judgment, holding that Savannah was not liable for demurrage. The court stated that a bill of lading is essentially a contract and Savannah could not be made a party to that contract without its knowledge or consent. In sum, the court held that Savannah "cannot be made a consignee by the unilateral action of a third party, particularly where Savannah Re-Load was not given notice of the unilateral designation in the bills of lading." Norfolk appeals the district court's denial of its motion for partial summary judgment and grant of summary judgment to Savannah.

II.

We review a district court's grant or denial of summary judgment *de novo*, considering all the facts and reasonable inferences in the light most favorable to the nonmoving party. *See Owner-Operator Indep. Drivers Ass'n, Inc. v. Landstar Sys. Inc.*, 541 F.3d 1278, 1287 (11th Cir. 2008). Under Fed. R. Civ. P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

any, which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323, 106 S. Ct. at 2553 (internal quotations omitted). If the movant succeeds in demonstrating the absence of a material issue of fact, the burden shifts to the non-movant to show the existence of a genuine issue of fact. *See Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1116 (11th Cir. 1993).

A. Demurrage liability

We begin our analysis by examining the basis for the district court's decision, and in doing so, review several fundamental principles of law that define demurrage liability. First, demurrage is considered part of the transportation charge and under the tariff system is imposed as a matter of law. However, "[b]efore such transportation-related assessments such as detention charges can be imposed on a party . . . there must be some legal foundation for such liability outside the mere fact of handling the goods shipped." *Middle Atl. Conference v. United States*, 353 F. Supp. 1109, 1118 (D.D.C. 1972) (three-judge panel).[4] In *Evans Prods. Co. v. Interstate Commerce Comm'n*, the Seventh Circuit held that "[l]iability for freight charges may be imposed only against a consignor, consignee, or owner of the property, or others by statute, contract, or prevailing custom." 729 F.2d 1107, 1113 (7th Cir. 1984) (citations omitted); *see also S. Pac. Transp. Co. v. Matson*

4. We note that research has disclosed very few opinions by federal circuit courts dealing with the narrow issue presented in this case. Thus, we have cited those authorities that are available.

Navigation Co., 383 F. Supp. 154, 156 (N.D. Cal. 1974) ("The obligation to pay demurrage arises either out of contract, statute or prevailing custom"); *Middle Atl.*, 353 F. Supp. at 1118 (liability for demurrage "must be founded either on contract, statute or prevailing custom"). Norfolk has not offered any evidence of prevailing industry custom or applicable statute that would hold non-parties to a shipping contract liable for demurrage. Furthermore, it is undisputed that Savannah is neither consignor nor owner of the freight. Thus, Savannah is liable for demurrage only if it were the consignee or contractually assumed responsibility for the charges.

A freight handler such as Savannah is free to contractually assume liability for demurrage charges and "this is sometimes done through average demurrage agreements to promote their own business and in some instances to obtain the benefits of lower detention costs for the benefit of their customers." *Middle Atl.*, 353 F. Supp. at 1122. However, in the instant case, there is no evidence to suggest that Savannah independently contracted with either Norfolk or Galaxy regarding demurrage charges. This leaves us only with the question of Savannah's consignee status to determine demurrage liability.

As mentioned previously, the bill of lading is the basic transportation contract between the shipper-consignor and the carrier. Thus, as an original party to the shipping contract, a consignor is clearly liable for demurrage. However, "a consignee's liability is quasi-contractual, and

arises by operation of law when the consignee accepts delivery of the goods . . ." *Consol. Rail Corp. v. Com., Pa. Liquor Control Bd.*, 90 Pa. Commw. 595, 496 A.2d 422, 424 (Pa. Cmwlth. 1985). *See also Pittsburgh v. Fink*, 250 U.S. 577, 581, 40 S. Ct. 27, 63 L. Ed. 1151 (1919) ("The weight of authority seems to be that the consignee is prima facie liable for the payment of the freight charges when he accepts the goods from the carrier"). By accepting delivery of a shipment, the consignee's conduct assumes a quasi-contractual significance by virtue of the transportation contract, which identifies the parties and assigns responsibility for particular charges. The contract implied from the acceptance of a shipment extends no further than the conditions upon which its delivery is made dependant. Unless the bill of lading provides to the contrary, the consignor remains primarily liable for the freight charges and pursuant to the carrier's tariff, the consignee becomes liable for demurrage charges at the freight's destination. Thus, only an original party to the rail transportation contract, or a consignee by virtue of acceptance of the goods, may be liable for demurrage. As a district court in our circuit put it, "all the reported opinions agree that only a party to the rail transportation contract may be liable for demurrage." *CSX Transp., Inc. v. City of Pensacola, Fla.*, 936 F. Supp. 880, 884 (N.D. Fla. 1995); *see also Union Pac. R.R. Co. v. Ametek, Inc.*, 104 F.3d 558 (3d Cir. 1997) (holding demurrage could not be assessed against a warehouse that was not a consignee or other party to the transportation contract); *Matson*, 383 F. Supp. at 156 (the obligation to pay demurrage "arises out of the

contractual relationship and may only be imputed to parties to the contract"); *Middle Atl.*, 353 F. Supp. 1109 (finding a carrier's proposed tariff unlawful to the extent that it attempted to impose liability for demurrage charges on non-parties to the transportation contract); *Missouri, K. & T. Ry. Co. of Texas v. Capital Compress Co.*, 50 Tex. Civ. App. 572, 110 S.W. 1014, 1016 (Tex. Civ. App. 1908) (holding a cotton compress company not liable to carrier for demurrage because "[t]he findings of fact fail to show any contractual relation between them in reference to the shipment of the cotton").

There are exceptions to a consignee's demurrage liability. A consignee may avoid demurrage liability by notifying the carrier of its agency status prior to accepting delivery of the shipment. "The law is well settled that an agent for a disclosed principal is not liable to a third person for acts within the scope of agency." *Middle Atl.*, 353 F. Supp. at 1120-21; *See also Whitney v. Wyman*, 101 U.S. 392, 396, 25 L. Ed. 1050 (1879) ("Where the principal is disclosed, and the agent is known to be acting as such, the latter cannot be made personally liable unless he agreed to be so"). The ICCTA recognizes the common law rule of agency and provides in relevant part:

> When the shipper or consignor instructs the rail carrier transporting the property to deliver it to a consignee that is an agent only, not having beneficial title to the property, the consignee is liable for rates billed at the time of delivery for which the consignee is

> otherwise liable, but not for additional rates that may be found to be due after delivery if the consignee gives written notice to the delivering carrier before delivery of the property—
>
> > (A) of the agency and absence of beneficial title; and
> >
> > (B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.

49 U.S.C. § 10743(a)(1) (1995). Thus, an agent-consignee can avoid demurrage liability by notifying the carrier of its agency status and providing the carrier with the name and address of the shipment's beneficial owner prior to accepting delivery.

Thus far our analysis has surveyed the undisputed aspects of demurrage liability. The parties agree that an entity must be a party to the transportation contract to be liable for demurrage charges, that a consignee becomes a party to the transportation contract upon accepting the freight consigned to it, and that a consignee may avoid demurrage liability by disclosing its agency status prior to accepting delivery of the shipment. We now turn to the key question of whether Savannah was a consignee in the context of this case.

Appendix A

B. A consignee by any other name . . .

The issue before the court is whether Savannah was a consignee of the freight delivered by Norfolk. Norfolk contends that Savannah was a consignee because it was identified as such on the bills of lading and accepted delivery of the shipments. Savannah argues that it cannot be made a consignee merely because a third party unilaterally listed it as such without its knowledge or consent. Both the Seventh and Third Circuits have addressed this issue in cases involving similar fact patterns. *See Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813 (7th Cir. 2003); *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247 (3d Cir. 2007), *cert denied*, 552 U.S. 1183, 128 S. Ct. 1240, 170 L. Ed. 2d 65 (2008). The Seventh and Third Circuits reached differing conclusions on this issue resulting in a conflict of authority among the two circuits. *See South Tec*, 337 F.3d at 821; *Novolog*, 502 F.3d at 262.

In *South Tec*, the Seventh Circuit reasoned that the preliminary issue was whether the defendant warehouseman was a consignee. Although the case was remanded to the district court for determination of the warehouseman's status, the Seventh Circuit stated that "being listed by third parties as a consignee on some bills of lading is not alone enough to make [a warehouseman] a legal consignee liable for demurrage charges . . . ." *South Tec*, 337 F.3d at 821.

Like *South Tec*, the defendant in *Novolog*, who was named as consignee without its authorization, argued

that "the shipper's or carrier's unilateral decision to designate [it] as the consignee, without [it]'s permission and where [it] is not the ultimate consignee of the freight, cannot establish its status as a consignee for purposes of demurrage liability under the statute or otherwise." *Novolog*, 502 F.3d at 257. The Third Circuit disagreed for three reasons. *See id.* First, because "nothing in the statutory language [of section 10743(a)(1)] suggests that it intends to restrict the term 'consignee' to the ultimate consignee of the freight or use it to mean anything other than the person to whom the bill of lading authorized delivery and who accepts that delivery." *Id.* Second, because "to hold that the documented designation of an entity as a consignee and that entity's acceptance of the freight is insufficient to hold it presumptively liable for demurrage charges would frustrate the plain intent of the statute, which is to establish clear, easily enforceable rules for liability." *Id.* Third, because it would be equitable to treat the named consignee as presumptively liable, as under the statutory scheme "the named consignee can avoid liability in two ways: first, by refusing the freight . . . and second, by providing the carrier timely written notice of agency under Section 10743(a)(1), if appropriate." *Id.* at 259.

The *Novolog* court declined to follow the Seventh Circuit's conclusion in *South Tec* and held that "an entity named on a bill of lading as the sole consignee, without any designations clearly indicating any other role, is presumptively liable for demurrage fees on the shipment to which that bill of lading refers. *Id.* at 262. A party

may rebut that presumption by showing that it never accepted delivery of the shipment, or that it was acting as an agent and followed the notification provisions of 49 U.S.C. § 10743(a)(1). *See id.* at 250, 259. Ultimately, the *Novolog* court remanded the case because "the factual record was not sufficiently developed . . . [t]o determine what the bills of lading showed." *Id.* at 250.

Norfolk relies almost exclusively on the Third Circuit's decision in *Novolog* and argues that as the named consignee on the bills of lading, Savannah was required to either refuse delivery of the shipments or comply with the agency notification requirements of the ICCTA to avoid demurrage liability. However, Norfolk incorrectly assumes that Savannah is the consignee for the shipments at issue simply because it is listed as such on the bills of lading. Norfolk has made no effort to establish Savannah's status as a consignee through either interrogatories or deposition testimony. In fact, Savannah's status as a consignee was neither alleged nor admitted in the pleadings.

Norfolk further argues that section 10743(a)(1) establishes a presumption of liability for demurrage charges. However, section 10743(a)(1) "applies only to agents who are also consignees, and not to agents who are not consignees." *South Tec*, 337 F.3d at 817. Furthermore, that section "speaks only to the 'nonliability' in certain narrow situations . . . but in no way can be read to impose liability on an agent not a party to the contract." *Middle Atl.*, 353 F. Supp. at 1120. If we were to accept Norfolk's assertion that section

10743(a)(1) establishes a presumption of liability, then we would also have to accept that merely naming an entity as consignee on a bill of lading creates a presumption of that status. We are unwilling to accept either proposition and agree with the district court that "the *Novolog* rule of presumptive liability cannot function in a situation where the receiver of freight is not given notice that it has been listed as a consignee by third parties."

Norfolk maintains that Savannah had either actual or constructive knowledge of its designation as consignee on the bills of lading. Yet, Norfolk has failed to present any evidence that Savannah was informed of its consignee designation prior to delivery. Thus, no evidence of actual knowledge exists in the record. Norfolk asks: "if Savannah is neither the consignee nor a disclosed agent of a consignee, how or why is Savannah accepting delivery of the freight?" This question implies that Savannah should have known it was the named consignee because freight shipments may only be delivered to and accepted by the consignee. However, we find this argument inconsistent with the record, which indicates that Norfolk made numerous deliveries to Savannah where it was not the named consignee. Norfolk later amended its complaint to exclude these shipments from its claim for demurrage charges. Savannah cannot be expected to either refuse delivery or notify Norfolk of its agency status when it has no knowledge of which shipments, if any, it has been designated as consignee.

Appendix A

Norfolk emphasizes that it is "well-established and oft-repeated" that a "consignee becomes a party to the contract, and is therefore bound by it, upon accepting the freight . . . ." *Novolog*, 502 F.3d at 254. However, this does not answer the key question: how does an entity become a consignee in the first place?

As previously defined, a consignee is the party designated to receive a shipment of goods. But, consignee status is more than a mere designation. The term takes on a legal significance due to the quasi-contractual relationship that arises between the consignee and the carrier. "Although a consignee's liability may rest upon quasi-contract, a party's status as consignee is a matter of contract and must be established as such." *Consol. Rail Corp. v. Com., Pa. Liquor Control Bd.*, 90 Pa. Commw. 595, 496 A.2d 422, 424 (Pa. Cmwlth. 1985). Like any contractual relationship, there must be a meeting of the minds between the parties. This Circuit has previously recognized that "it is a fundamental principle of contracts that in order for a contract to be binding and enforceable, there must be a meeting of the minds on all essential terms and obligations of the contract." *Browning v. Peyton*, 918 F.2d 1516, 1521 (11th Cir. 1990); *see also, e.g.*, Rest (Second) of Contracts § 17(1) (1981) ("the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration"). Furthermore, it is a tenent of contract law that "a third-party cannot be bound by a contract to which it was not a party." *Miles v. Naval Aviation Museum Found., Inc.*, 289 F.3d 715, 720 (11th

Cir. 2002); *see also E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002) ("It goes without saying that a contract cannot bind a nonparty."); *Union Pac. R.R. Co. v. Carry Transit, Inc.*, No. 3:04-CV-1095B, 2005 U.S. Dist. LEXIS 45568, at *13 (N.D. Tex. Oct. 27, 2005) ("It is a fundamental tenent of contract law that parties to a contract cannot bind a non-party."). Thus, a party must assent to being named as a consignee on the bill of lading to be held liable as such, or at the least, be given notice that it is being named as a consignee in order that it might object or act accordingly.

Given these legal principles, we agree with the district court's holding that Savannah was not a consignee, and thus not liable for demurrage charges. Savannah did not agree to be named as consignee on the bills of lading between Norfolk and the various shippers, and was not aware of its designation as such. Savannah cannot be made a party to shipping contracts without its consent or notice of such, and thus cannot be liable to Norfolk for demurrage.

Not only is this approach in keeping with the legal principles outlined above, it also has the greatest support in the case law. *See Matson*, 383 F. Supp. at 157 (reserving the question of whether a consignee who has played an active role in the railroad transportation contract or has an interest in or control over the goods may be liable for the demurrage, but stating: "[W]here, as here, a connecting carrier-consignee is merely named in the railroad bill of lading without either more

involvement on its part, or some culpability for the delay, it cannot be held liable to the railroad for demurrage. To hold otherwise on these facts would be to place a connecting carrier's liability totally within the shipper's control, a result the Court cannot sanction."); *W. Maryland Ry. Co. v. S. African Marine Corp.*, No. 86 CIV 2059, 1987 U.S. Dist. LEXIS 7323, 1987 WL 16153, at *4 (S.D.N.Y. Aug. 13, 1987) ("[W]e decline to hold, as plaintiff urges, that a connecting ocean carrier is liable for rail demurrage charges as a matter of law merely by virtue of being named by the shipper as the consignee in the rail bills of lading."); *Carry Transit, Inc.*, 2005 U.S. Dist. LEXIS 45568, at *14 (shipper's unilateral decision to list defendant as consignee on bills of lading without its consent did not transform defendant into an actual consignee liable for demurrage); *Capital Compress Co.*, 110 S.W. at 1016 (entity not liable for demurrage where mistakenly listed as consignee on bill of lading, because there was no contractual relationship between that entity and the carrier); *CSX Transp. v. Pensacola*, 936 F. Supp. at 884 (stating in dicta that "[t]he unilateral action of one party in labeling an intermediary as a consignee does not render the putative consignee liable for demurrage" and indicating that an agreement to be contractually bound is key to demurrage liability); *Evans Prods.*, 729 F.2d at 1113 ("No liability [for freight charges] exists merely on account of being named in the bill of lading . . . .").

III.

For the foregoing reasons, the summary judgment of the district court is,

AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION DATED AND FILED SEPTEMBER 15, 2008

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

CASE NO. CV407-155

NORFOLK SOUTHERN RAILWAY COMPANY,

Plaintiff,

v.

BRAMPTON ENTERPRISES, LLC
d/b/a SAVANNAH RE-LOAD,

Defendant.

ORDER

Before the Court are the Motion for Summary Judgment by Defendant Brampton Enterprises, LLC d/b/a Savannah Re-Load ("Savannah Re-Load")(Doc. 25) and the Motion for Partial Summary Judgment by Plaintiff Norfolk Southern Railway Company (Doc. 29). For the reasons that follow, Savannah Re-Load's Motion for Summary Judgment is **GRANTED**, and Norfolk

Southern's Motion for Partial Summary Judgment is **DENIED.**[1]

BACKGROUND

Defendant Savannah Re-Load is a warehouse business that receives and forwards freight. In late 2006, Savannah Re-Load began handling freight shipped on rail cars owned by Plaintiff Norfolk Southern.

Norfolk Southern transported freight on behalf of various shippers and delivered it to Savannah Re-Load. The majority of the bills of lading for the freight identified Savannah Re-Load as the consignee who was to receive the goods. A "bill of lading" is a "document of title acknowledging the receipt of goods by a carrier or by the shipper's agent" and "a document that indicates the receipt of goods for shipment and that is issued by a person engaged in the business of transporting or forwarding goods." Blacks' Law Dictionary 159 (7th ed. 1999). A "consignee" is "one to whom something is consigned or shipped." *See* Webster's Third New International Dictionary (1971) (unabridged). "Consign" means "[t]o transfer to another's custody or charge" or "[t]o give (goods) to a carrier for delivery to a designated recipient." Black's Law Dictionary 303 (7th ed. 1999).

Under the controlling tariff set by Norfolk Southern, a consignee is allowed two days to unload

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1. Norfolk Southern's Request for Oral Argument (Doc. 50) is **DENIED.**

freight without incurring demurrage charges. Demurrage is "a charge exacted by a carrier from a shipper or consignee on account of a failure to load or unload cars within the specified time prescribed by the applicable tariffs. Railroads charge shippers and receivers of freight 'demurrage' fees if the shippers or receivers detain freight cars on the rails beyond a designated number of days." *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247, 251 n.1 (3d Cir. 2007)(quoting *Union Pac. R.R. Co. v. Ametek, Inc.*, 104 F.3d 558, 559 n.2 (3d Cir. 1997)). "It is intended to both compensate for the delay, and to promote efficiency by deterring undue delays." *CSX Transp., Inc. v. City of Pensacola*, 936 F. Supp. 880, 883 (N.D. Fla. 1995)(internal citation omitted).

Norfolk Southern alleges that Savannah Re-Load is liable for demurrage for the failure to timely unload and return the rail cars. It relies on the bills of lading, which identify Savannah Re-Load as a consignee. After the delays, Norfolk Southern sent invoices to Savannah Re-Load for the demurrage charges.[2] These invoices also identified Savannah Re-Load as the consignee.

Savannah Re-Load maintains that it was not a consignee for the freight and is, therefore, not liable

2. Norfolk Southern computes demurrage monthly. At the end of each month, a customer's total demurrage days are netted against total credits for returning rail cars early. If total demurrage days exceed credits, those days are charged at the daily rate for demurrage as published in Norfolk Southern's tariff. (*See* Doc. 26 Ex. C.)

for demurrage. According to Savannah Re-Load, freight-forwarding companies make their transport arrangements—to send freight via Norfolk Southern or other carriers—without Savannah Re-Load's input. (*See* Groves Aff., Doc. 26 Ex. A.) The freight-forwarding companies unilaterally give Savannah Re-Load notice that a given shipment is enroute to its facility. After the freight arrives at the facility, Savannah Re-Load unloads the freight and forwards it to various ports for export according to instructions from the freight-forwarding company. Savannah Re-Load never takes any ownership interest in the freight it handles and is never the freight's final destination. Savannah Re-Load is never a party to the transportation contract, and only operates as instructed by the freight-forwarding companies. (*Id.*)

Savannah Re-Load also contends that it is neither provided with copies of the bills of lading nor informed of the contents of the bills of lading. (*Id.* at 1.) With respect to the freight at issue in this case, Savannah Re-Load did not draft, approve of, or receive any bills of lading associated with the rail freight at any time. Similarly, it did not receive copies of the purchase or transportation contracts. In general, Savannah Re-Load does not inspect or evaluate freight to see if it arrives in conformity with the purchase or transportation contract. Savannah Re-Load admits that it was identified as a consignee in the bills of lading, but claims that this was a unilateral act of the shipper, about which it had no knowledge. (*Id.*)

Appendix B

ANALYSIS

It is well-established that one must be a consignee or a party to the transportation contract in order to be liable for demurrage. *Middle Atl. Conference v. United States*, 353 F. Supp, 1109, 1118 (D.D.C. 1972). The parties agree that the issue before the Court in this case is whether Defendant Savannah Re-Load was a consignee of the freight delivered by Plaintiff Norfolk Southern. Norfolk Southern contends that Savannah Re-Load was a consignee because it was identified as a consignee on the bills of lading and because it accepted delivery of the rail cars and the freight. Savannah Re-Load argues that it cannot be made consignee merely because a third party unilaterally listed it as such without its knowledge or consent.

I. Savannah Re-Load did not receive notice that it was listed as a consignee.

Savannah Re-Load claims that it did not receive notice that it was listed as a consignee in the bills of lading. The operator of Savannah Re-Load, Billy Groves, states that Savannah Re-Load did not receive any bills of lading and was never informed that the bills of lading identified it as a consignee. (Groves Aff. at 1-2.)

Norfolk Southern acknowledges that it did not provide Savannah Re-Load with bills of lading because this is not standard practice in the industry. Norfolk Southern surmises that Savannah Re-Load received notice of its consignee designation in the forwarding

instructions from the freight-forwarding companies, but there is no evidence of this. Norfolk Southern informed Savannah Re-Load of the consignee designation in invoices it sent to Savannah Re-Load for demurrage *after* the delays occurred, and therefore after the demurrage claim arose. There is no other evidence that Savannah Re-Load received any notice that it was designated as a consignee on the bills of lading.

In the absence of a genuine issue of material fact, the Court finds that Savannah Re-Load had no knowledge that it was listed as a consignee until after the delays occurred.

II. Savannah Re-Load was not a consignee.

The Court holds that Savannah Re-Load cannot be made a consignee by the unilateral action of a third party, particularly where Savannah Re-Load was not given notice of the unilateral designation in the bills of lading. There are no binding decisions on this issue in the Eleventh Circuit, and other courts have issued conflicting decisions. But, as explained below, the weight of authority supports this holding and provides the more reasonable result under the specific facts of this case.

The Interstate Commerce Commission Termination Act (TCCTA) governs the demurrage liability of consignee-agents when the transportation is provided by a rail carrier. The consignee-agent liability provision provides, in pertinent part:

> When the shipper or consignor instructs the rail carrier transporting the property to deliver it to *a consignee that is an agent only*, not having beneficial title to the property, *the consignee* is liable for rates [for transportation] billed at the time of delivery for which *the consignee* is otherwise liable, but not for additional rates [including demurrage] that may be found to be due after delivery if *the consignee* gives written notice to the delivering carrier before delivery of the property (A) of the agency and absence of beneficial title; and (B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.

49 U.S.C. § 10743 (a) (1).

In a case involving similar facts, the Seventh Circuit held that this statute "applies only to agents who are also consignees, and not to agents who are not consignees." *Ill, Cent. R.R. Co. v. S. Tec Develop. Warehouse, Inc.*, 337 F.3d 813, 817 (7th Cir. 2003), After concluding that the statute only applies to consignees, the court reasoned that the preliminary issue was whether the defendant warehouseman was a consignee. Although the case was remanded to the district court for a final determination of the warehouseman's status, the Seventh Circuit stated that "being listed by third parties as a consignee on some bills of lading is not alone

enough to make a [warehouseman] a legal consignee liable for demurrage charges." *Id.* at 821.

The *South Tec* opinion is consistent with several other decisions. In *Southern Pacific Transportation Co. v. Matson Navigation Co.*, 383 F. Supp. 154 (N.D. Cal. 1974), the court held that the defendant terminal operator was not liable for demurrage. The defendant was not named as consignee on the bills of lading for *most* of the shipments, but was named as consignee for *some* of the shipments. First, the court held that the defendant could not be liable for demurrage where the bills of lading named it as a "care of" party and not as consignee. The court then stated:

> Turning now to those instances where [the terminal operator] was named consignee on the railroad bill of lading, the Court observes that the holding set forth above does not necessitate a holding here that anyone named as consignee in a contract of transportation can be held liable for demurrage.
>
> There is no evidence that [the terminal operator] authorized shippers to consign goods to it or that it performed its task differently in those instances. In fact the sole difference between the two situations was the shipper's unilateral decision whom to name as consignee. The instant case differs in this respect from the others cited by the parties,

> where the consignee was either the purchaser of the cargo or, at least, the person to whom final delivery was to be made and who thus had an interest in and control over the cargo.

Id. at 157. Based on this reasoning, the court held that the defendant was not liable for demurrage where it was unilaterally named by the shipper as consignee in the bills of lading. To hold otherwise, stated the court, "would be to place a connecting carrier's liability totally within the shipper's control, a result the [c]ourt cannot sanction." *Id.*; see *also Union Pac. R.R. Co. v. Carry Transit, Inc.*, No. 3:04-CV-1095B, 2005 U.S. Dist. LEXIS 45568 (N.D. Tex. 2005)(declining to "untether the law of demurrage from its contractual moorings" and holding that "a [shipper's] unilateral decision to name a non-party to the transportation contract . . . as a consignee without its consent does not render the non-party a consignee liable for demurrage charges"); *W. Md. Ry. Co. v. S. African Marine Corp.*, 1987 U.S. Dist. LEXIS 7323, 1987 WL 16153, *4 (S.D.N.Y. 1987)(holding that a connecting ocean carrier is not liable fox rail demurrage charges "merely by virtue of being named by the shipper as the consignee in the rail bills of lading"); *see generally CSX Transp., Inc. v. City of Pensacola*, 936 F. Supp. 880, 884 (N.D. Fla. 1995)(finding defendant not liable for demurrage where it had not been named as consignee in the bills of lading, but stating in dicta that the "unilateral action of one party in labeling an intermediary as a consignee does not render the putative consignee liable for demurrage").

In opposition to this line of authorities, Norfolk Southern relies on a recent decision by the Third Circuit in *CSX Transportation Co. v. Novolog Bucks County*, 502 F.3d 247 (3d Cir. 2007). The Third Circuit "decline[d] to follow" the authorities cited above, specifically the Seventh Circuit's decision in *South Tec. Id.* at 259. Instead, the Third Circuit held that "recipients of freight who are named as consignees on bills of lading are subject to liability for demurrage charges arising after they accept delivery unless they act as agents of another and comply with the notification procedures established in ICCTA's consignee-agent liability provision, 49 U.S.C. § 10743(a)(1)." *Id.* at 254. According to the Third Circuit, the statutory provision applies to an entity listed as consignee on the bill of lading, even if the entity was unilaterally named as consignee by the shipper, is not a party to the transportation contract, and has no ownership interest in the freight. *Id.* at 252. Under the Third Circuit's reading of the statute, "a transloader or other such entity, if named on the bill of lading as the sole consignee, is *presumptively liable* for demurrage charges arising from unloading delays, unless it accepts the freight as the agent of another and notifies the carrier of its status [as an agent] in writing prior to the delivery." *Id.* at 250 (emphasis added). The court reasoned that consignee status was established by "the documented designation of an entity as a consignee and that entity's acceptance of the freight." *Id.* at 257.

In this case, Norfolk Southern argues, based on the *Novolog* decision, that Savannah Re-Load is liable for demurrage because (1) Savannah Re-Load is identified

as a consignee on the bills of lading; (2) Savannah Re-Load accepted delivery of the rail cars and the freight; and (3) Savannah Re-Load did not notify Norfolk Southern of its agent status and the name and address of the beneficial owner. Effectively, Norfolk Southern contends that Savannah Re-Load accepted it status as consignee by accepting the freight, and it suggests that Savannah Re-Load could have rejected these terms by rejecting the freight or giving notice of its agent status.

The Court disagrees. Consistent with Seventh Circuit's decision in *South Tec*, the Court holds that ICCTA's consignee-agent liability provision applies only to consignees. *South Tec*, 337 F.3d at 817. Therefore, an entity that is not a consignee is not obligated to comply with the statutory notice provisions in order to avoid liability for demurrage, and such an entity does not become a consignee by operation of the statute.

The Court also holds that a theory of acceptance by conduct is inapplicable to a situation where Savannah Re-Load was unaware of terms set unilaterally by third parties. As discussed above, there is no evidence that Savannah Re-Load was provided with the bills of lading or informed of the terms of the bills of lading. The Court finds that the *Novolog* rule of presumptive liability cannot function in a situation where the receiver of freight is not given notice that it has been listed as a consignee by third parties.

Appendix B

In *South Tec*, the Seventh Circuit suggested that being listed on the bills of lading, "coupled with other factors," might be enough to render a warehouseman a consignee. *South Tec*, 337 F.3d at 821. Such "other factors" could include receiving notice of a consignee designation, playing an active role in the railroad transportation contract, or having an interest in or control over the goods. *See id.* at 821-22; *W. Md. Ry. Co.*, 1987 U.S. Dist. LEXIS 7323, 1987 WL 16153 at *4; *Matson*, 383 F. Supp. at 157. But factors such as these are not at play in this case.[3]

Next, Norfolk Southern argues that "regardless of whether Savannah Re-Load was provided with the necessary documentation, the fact remains that the rail cars were delivered to Savannah [Re-Load] by Norfolk Southern, and that while those rail cars were in the control, custody, and possession of Savannah [Re-Load], the federal law requiring demurrage was frustrated by Savannah [Re-Load]'s detention of rail cars in excess of the allotted amount of time." (Plf.'s Reply at 7.) Although such a rule would be appealing in its simplicity, it is

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3. Norfolk Southern states that after it demanded payment for the demurrage charges, representatives from Savannah Re-Load disputed the manner in which the demurrage charges were calculated, but never disputed that it was the consignee that had responsibility to pay the demurrage charges. With this statement, Norfolk Southern suggests that Savannah Re-Load admitted its liability in negotiations prior to the filing of this lawsuit. This is insufficient to create a legal liability. Savannah Re-Load did not pay any of the demurrage invoices, and Norfolk Southern brought this lawsuit as a result.

inconsistent with the well-established law that one must be a consignee or a party to the transportation contract in order to be liable for demurrage. *Middle Atl. Conference*, 353 F. Supp. at 1118. And as explained above, Savannah Re-Load cannot be made a consignee by the unilateral action of a third party where Savannah Re-Load was not given notice that it was listed as a consignee in the bills of lading.

CONCLUSION

Accordingly, Savannah Re-Load's Motion for Summary Judgment is **GRANTED**. Norfolk Southern's Motion for Partial Summary Judgment is **DENIED**. The Clerk of Court is **DIRECTED** to **CLOSE** this case.

SO ORDERED this 15th day of September, 2008.

/s/ William T. Moore, Jr.
WILLIAM T. MOORE, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED JANUARY 7, 2010

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-15418-JJ

NORFOLK SOUTHERN RAILWAY COMPANY,

Plaintiff-Appellant,

versus

BILLY GROVES, individually, d.b.a. Savannah Re-Load, SAVANNAH RE-LOAD, et al.,

Defendants,

BRAMPTON ENTERPRISES, LLC, d.b.a. Savannah Re-Load,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Appendix C

Before: CARNES, FAY and ALARCÓN,* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Peter Fay
UNITED STATES CIRCUIT JUDGE

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* Honorable Arthur L. Alarcón, United States Circuit Judge for the Ninth Circuit, sitting by designation.

Supreme Court, U.S.
FILED
JUL 2 - 2010
OFFICE OF THE CLERK

No. 09-1212

In the
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

BILLY GROVES, INDIVIDUALLY, D.B.A. SAVANNAH RE-LOAD, SAVANNAH RE-LOAD, AND BRAMPTON ENTERPRISES, LLC, D.B.A. SAVANNAH RE-LOAD,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This is a contracts case, albeit one that arose from the world of transportation. Norfolk Southern Railway Company (hereinafter "Norfolk Southern") seeks to recover demurrage—a fee which is akin to a rental charge for the use of Norfolk Southern's rail cars—from Brampton Enterprises LLC d/b/a Savannah Re-Load (hereinafter "Savannah Re-Load"). Because demurrage is based on contract principles, Norfolk Southern can recover it from anyone who is a party to the transportation contract. A consignee is not a party to the transportation contract between the shipper and the carrier; however, a consignee joins the transportation contract when it accepts freight consigned to it and therefore becomes liable for demurrage.

Savannah Re-Load is a warehouseman and is not the consignee for any of the freight it handles. However, Norfolk Southern delivered freight to Savannah Re-Load's facility where the bills of lading allegedly misidentified Savannah Re-Load as the consignee. Savannah Re-Load was unaware of this designation.

Given Norfolk Southern's efforts to collect demurrage from Savannah Re-Load on the ground that Savannah Re-Load adopted the transportation contract by accepting freight without knowledge it had been named the consignee, the following questions arise:

1. Does a bill of lading, which is a contract between the carrier and the shipper, bind a third party without that third party's consent or knowledge?

2. Can Savannah Re-Load be made a party to the transportation contract between the shipper and carrier, and therefore liable for demurrage, against its will and without its knowledge?

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

The caption of this brief contains the names of all the parties to the proceeding in the court whose judgment is sought to be reviewed.

The caption incorrectly identifies "Billy Groves, individually, d/b/a Savannah Re-Load, Savannah Re-Load" as Respondents. The district court dropped William Groves and Savannah Re-Load as Party Defendants on December 14, 2007. (R-19).

Respondent Brampton Enterprises, LLC is a non-governmental limited liability company having no parent or publicly held company owning 10% or more of the its stock.

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STATEMENT OF THE CASE

Norfolk Southern filed this action in the district court and seeks to recover $70,680 from a family-owned company with six employees. Norfolk Southern alleges Savannah Re-Load is a consignee, and therefore liable for demurrage, in various bills of lading. The unrebutted evidence is that any bill of lading which identified Savannah Re-Load as consignee[1] did so in error, without Savannah Re-Load's consent or knowledge. (R-26, Ex. A, p. 2).

Demurrage Background

"[D]emurrage is 'a charge exacted by a carrier from a shipper or consignee on account of a failure to load or unload cars within the specified time prescribed by the applicable tariffs. . . .'" *Union Pac. R.R. Co. v. Ametek, Inc.*, 104 F.3d 558, 559 (3rd Cir. 1997)(citing *Black's Law Dictionary* 432 (6th ed. 1990)). Liability for demurrage may be imposed against a consignor, consignee, or owner of the property, or on others by

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[1] Norfolk Southern states in its petition that the "various bills of lading for the freight contained within the rail cars all named [Savannah Re-Load] as the sole consignee." (Pet., p. 18). However, this is not correct. Many of the documents identify an "ultimate consignee" and reveal that the freight will be exported via container ship following its delivery to Savannah Re-Load. (R-46, Ex. A, NS 1237-1255, 1260-1262, 1265-1270, 1314-1316, 1322-1330, 1336-1359, 1377-1379, 1385-1422). Other documents do not contain the word "consignee." (R-46, Ex. A, NS 1442-1495); *see also Norfolk Southern Ry. Co. v. Groves*, 586 F.3d 1273, 1276 (11th Cir. 2009) (finding that "many of these bills of lading also named an ultimate consignee and printed copies of the electronic bill of lading data submitted by Norfolk did not actually contain the word 'consignee'").

statute, contract, or prevailing custom. *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247, 254 (3rd Cir. 2007)(hereinafter "*Novolog*"). Demurrage liability in this case is a matter of contract. *Norfolk Southern Ry. Co. v. Groves*, 586 F.3d 1273, 1278-79 (11th Cir. 2009)(hereinafter "*Groves*"). The bill of lading is "the basic transportation contract between the shipper-consignor and the carrier." *Southern Pac. Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 342 (1982). The consignee becomes liable for demurrage under quasi-contract notions by accepting delivery of the goods consigned to it, thereby becoming a party to the transportation contract. *Groves*, 586 F.3d at 1278-79; *Novolog*, 502 F.3d at 254.

Conversely, non-parties to the transportation contract are not liable for demurrage,[2] a point on which the Eleventh, Seventh and Third Circuits agree. *See Groves*, 586 F.3d at 1278-79; *Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813, 820 (7th Cir. 2003); *Union Pac. R.R. Co. v. Ametek, Inc.*, 104 F.3d at 563. Indeed, the ICC[3] also has a "longstanding policy not to extend demurrage tariffs to persons who are not parties to the transportation contract." *Union Pac. R.R. Co. v. Ametek, Inc.*, 104 F.3d at 563 (quoting a memorandum the ICC filed in the case).

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[2] "Norfolk has not offered any evidence of prevailing industry custom or applicable statute that would hold non-parties to a shipping contract liable for demurrage." *Groves*, 586 F.3d at 1278.

[3] As Norfolk Southern notes in its petition, the Interstate Commerce Commission Termination Act eliminated the Interstate Commerce Commission ("ICC") and replaced it with the Surface Transportation Board ("STB"). (Pet., p. 10 n.5).

Given this contractual background, it is not surprising that few decisions have addressed whether a non consignee joins the transportation contract against its will by receiving freight where it has been unilaterally identified as a consignee. Until 2007, the courts which addressed this question uniformly refused to hold that the unilateral action of a third party could render a non-consignee liable for demurrage. *See Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse, Inc*, 337 F.3d 813, 821 (7th Cir. 2003); *Union Pac. R.R. Co. v. Carry Transit, Inc.*, No. 3:04-CV-1095, 2005 U.S. Dist. LEXIS 45568, at *14 (N.D. Tex. Oct. 27, 2005)("The Court declines to untether the law of demurrage from its contractual moorings . . . . [The] unilateral decision to name a non-party to the transportation contract . . . as a consignee without its consent does not render the non-party liable for demurrage charges.")(hereinafter *"Carry Transit"*); *CSX Transp., Inc. v. City of Pensacola*, 936 F. Supp. 880, 884 (N.D. Fla. 1995) ("The unilateral action of one party in labeling an intermediary as a consignee does not render the putative consignee liable for demurrage."); *Western Maryland Ry. Co. v. South African Marine Corp.*, No. 86 CIV 2059, 1987 WL 16153, at *4 (S.D.N.Y. Aug. 13, 1987)("[W]e decline to hold, as plaintiff urges, that a connecting ocean carrier is liable for rail demurrage charges as a matter of law merely by virtue of being named by the shipper as the consignee in the rail bills of lading."); *Southern Pac. Transp. Co. v. Matson Navigation Co.*, 383 F. Supp. 154, 157 (N.D. Cal. 1974)("[W]here, as here, a connecting carrier-consignee is merely named in the railroad bill of lading without either more involvement on its part, or some culpability for the delay, it cannot be held liable to the railroad for demurrage. (citation omitted) To hold otherwise on these facts would be to

place a connecting carrier's liability totally within the shipper's control, a result the Court cannot sanction."); *Missouri, K. & T. Ry. Co. v. Capital Compress Co.*, 50 Tex. Civ. App. 572, 110 S.W. 1014 (Tex. Civ. App. 1908)(holding that company had no contractual relationship with railroad and therefore was not liable for demurrage despite a bill of lading mistakenly naming company as consignee).

This 99-year-old line of reasoning[4] lasted until the Third Circuit decided *Novolog* in 2007. In *Novolog*, the Third Circuit held for the first time that an entity designated as the consignee in a bill of lading through the unilateral action of a third party could not avoid demurrage charges by showing its lack of consent to being so designated. *Novolog*, 502 F.3d at 258. The Third Circuit did not discuss the contractual nature of a bill of lading or demurrage, other than to observe summarily that the consignee becomes a party to the transportation contract upon accepting the freight. *Id.* at 254. More importantly for purposes of this petition, *Novolog* did not address whether an entity named as consignee without its knowledge becomes a party to

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[4] In its Amicus Brief, the American Association of Railroads misstates this legal backdrop by claiming that "[u]ntil the Eleventh Circuit's decision below, the law was clear that a consignee named in the bill of lading becomes a party to the transportation contract, and is bound by it, when it accepts the freight." (Brief, p. 9)(emphasis added). Being named in the bill of lading has never been the determinative fact. With the exception of *Novolog*, every court which has considered the issue has concluded that being "named in the bill of lading" alone does not determine consignee status. The absence of cases to the contrary no doubt led the Eleventh Circuit to observe that "Norfolk Southern relies almost exclusively on the Third Circuit's decision in *Novolog*. . . ." *Groves*, *supra*, at 1280.

the transportation contract where it was never notified, until after the delivery of the freight, that it had even been identified as consignee. The Eleventh Circuit found this lack of notice dispositive. *Groves*, 586 F.3d at 1282. Given *Novolog's* silence on the issue of notice, there is no way to know how the Third Circuit would decide the instant case.

Facts Of This Case

There is no dispute that Savannah Re-Load was not the freight's ultimate consignee. (R-26, Ex. A, pp. 1-2; *See Groves*, 586 F.3d at 1278 (recognizing Savannah Re-Load to be "neither consignor nor owner of the freight" but rather a "freight handler"). Savannah Re-Load does not purchase the freight delivered to its facility, has no ownership interest in it, and has none of the rights or obligations of a consignee. (R 26, Ex. A, p. 1).[5] Instead, Savannah Re-Load is a warehouseman, receiving freight, storing it and reloading it into an appropriate container for export through the Georgia Ports Authority. (R-26, Ex. A, p. 2). Savannah Re-Load had no contractual relationship with the actual consignee and did not know its identity or the freight's ultimate destination (R-60, Ex. A, p. 2). It did not receive bills of lading from Norfolk

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[5] A consignee is generally vested with ownership of the freight consigned to it. *Grove v. Brien*, 49 U.S. 429, 439 (1850). As a result, the consignee is expected to examine the shipment's contents to determine whether they "answer the description ordered by him." *Reed Oil Co. v. Smith*, 154 Ga. 183, 186-87, 114 S.E. 56, 58 (1922). "[A] consignee may [therefore] direct the manner of the transportation of a shipment addressed to him." *Saunders Bros. v. Payne*, 29 Ga. App. 615, 615 16, 116 S.E. 349, 350 (1923)(internal citations omitted).

Southern or anyone else and never agreed to be named consignee. (R-26, Ex. A, pp. 1-2). Importantly, Savannah Re-Load did not know it had been named consignee on the freight delivered to its facility—a fact which distinguishes this case from *Novolog*.[6] Simply put, Savannah Re-Load was not the consignee.[7]

Norfolk Southern alleged in an amended complaint that Savannah Re-Load was identified as consignee on rail car shipments which Norfolk Southern delivered to Savannah Re-Load's facility. (R-67, Ex. A, p. 75). In its original complaint, however, Norfolk Southern sued Savannah Re-Load for demurrage which allegedly[8] accrued on every shipment, irrespective of whether

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[6] *Novolog* does not address the issue of notice.

[7] *Carry Transit*, *supra*, at *17 ("Although Carry Transit's Arlington facility may be the final stop on the Union Pacific rail line, Carry Transit is merely a transloader that unloads products from the rail cars and then delivers them to locations designated by their customers. (internal citations omitted). Carry Transit cannot thus be said to have any beneficial interest in its customers' products that are transported by [the plaintiff carrier].").

[8] Norfolk Southern claims that Savannah Re-Load's "sole defense to the claim was that it never agreed with any shipper to be named as the consignee on the bills of lading, and never received notice prior to delivery that it was named as consignee on the bills of lading." (Pet., p. 19). It is true that the district court granted summary judgment to Savannah Re-Load on the issue of its adoption of the transportation contract, that the Eleventh Circuit affirmed the district court's order and that Savannah Re-Load's alleged adoption of the transportation contract is the only issue on appeal. However, this point was not Savannah Re-Load's sole defense to Norfolk Southern's demurrage claim in the district court.

Savannah Re-Load was identified as consignee on the bill of lading. (R-1; R-67, Ex. A, p. 75). After Savannah Re-Load moved for summary judgment, Norfolk Southern amended its complaint to exclude shipments where Savannah Re-Load was not identified as consignee. (R-41; R-67, Ex. A, p. 75). For the remaining shipments, Norfolk Southern based liability on the ground that Savannah Re-Load was named as consignee in the associated bill of lading and became liable for any demurrage which accrued when it accepted the freight.

The district court granted Savannah Re-Load's motion for summary judgment on this question and the Eleventh Circuit affirmed. Norfolk Southern now petitions this Court for a writ of certiorari.

REASONS FOR DENYING THE PETITION

Norfolk Southern asks this Court to consider an issue which rarely arises and which has a modest impact upon rail carrier operations. Norfolk Southern (1) contends there is a split between the Eleventh and Third Circuits, (2) warns against far-reaching implications for the nation's rail transportation network, and (3) claims the Eleventh Circuit's opinion was so flawed as to constitute a departure from the accepted and usual course of judicial proceedings. Each argument is flawed and fails to justify a grant of the petition. The petition should therefore be denied.

A close examination of the Eleventh Circuit's *Groves* decision and the Third Circuit's *Novolog* decision reveals there is no split between those circuits. The Eleventh Circuit's decision is premised upon Savannah Re-Load's lack of knowledge that it

had even been identified as consignee. There is no discussion or suggestion in *Novolog* that the alleged consignee there had such lack of knowledge, and it is not clear how the Third Circuit would decide this case.

Moreover, Norfolk Southern's warnings that the Eleventh Circuit's opinion will harm the nation's rail transportation network are unfounded. Like any other litigant, rail carriers can use discovery to identify, and build a demurrage case against, the consignee in those rare instances where there is a dispute over the listed consignee's knowledge. If the carrier prefers to avoid the question altogether, it can always sue the shipper or any other party to the transportation contract for the demurrage. Whichever method Norfolk Southern chooses, there will be no impact upon freight delivery given that Norfolk Southern calculates demurrage and identifies the responsible entity after the fact. Additionally, since warehousemen such as Savannah Re-Load are incentivized to return empty rail cars in order to receive a fresh batch for unloading, Norfolk Southern's concerns about delayed returns are unfounded.

Regretting its decision to file this case in federal court, Norfolk Southern now seeks to undo years of litigation it initiated and have this matter transferred to the Surface Transportation Board. However, Norfolk Southern cannot raise this issue now for the first time before this Court. Moreover, its alleged basis for its jurisdictional claim—that the Eleventh Circuit redefined Norfolk Southern's tariff—is not supported by the action taken in the courts below. On its face, the Eleventh Circuit's decision did not purport to redefine or make any changes whatsoever to Norfolk Southern's tariff. It merely prevents Norfolk Southern

from going beyond established legal boundaries in collecting a debt.

Recognizing and enforcing these legal boundaries is far from a departure from the accepted and usual course of judicial proceedings which requires this Court's review. The Eleventh Circuit sided with 99 years of legal precedent in concluding that, because demurrage is based on contract concepts, one cannot be deemed to have unwillingly or unknowingly joining that contract.

A. No Circuit Split Exists On Whether A Consignee Can Be Liable Where It Does Not Know It Has Been Identified As Consignee.

This matter is not worthy of review by this Court because there is no split of authority between the Eleventh Circuit and the Third Circuit. *Groves* hinged on Savannah Re-Load's lack of notice that it had been identified as consignee on some of Norfolk Southern's bills of lading. *Groves*, 586 F.3d at 1282. The Eleventh Circuit recognized that Savannah Re-Load needs such notice "in order that it might object or act accordingly." *Id.* A meeting of the minds, necessary to join the transportation contract, could not occur without this notice. *Id.* at 1281.

In contrast to *Groves*, the *Novolog* court gave no treatment whatsoever to what impact a lack of notice might have on consignee liability.[9] Instead, the Third

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[9] Norfolk Southern calls *Novolog* and *Groves* "nearly identical" factually and argues the defendant in *Novolog* may have lacked notice because it (1) did not assent to being named consignee in

Circuit addressed only whether the bill of lading could establish the identity of the consignee. *Novolog*, 502 F.3d at 257 ("Having determined that [the Interstate Commerce Commission Termination Act's] consignee-agent notification provision applies to the assessment of demurrage charges, we must decide whether it automatically applies to entities that are named as consignees on the bills of lading or whether more is required to turn such entities into 'legal consignees' subject to it.").

The Third Circuit's reasoning does not cover the "lack of knowledge" situation present here. Citing 49 U.S.C. § 10743(a)(1), the Third Circuit held that a transloader named on the bill of lading as sole consignee is presumptively liable for demurrage unless it accepts the freight as the agent of another "**and notifies the carrier in writing prior to delivery**." *Novolog*, 502 F.3d at 250 (emphasis added). If the transloader does not know it has been named on the bill of lading until after the freight has been delivered, it cannot give timely notice to the carrier and will thus be conclusively liable. When, as here, the carrier routinely also makes deliveries to the transloader under bills of lading that do not identify the transloader as consignee, the transloader is placed in an untenable position when the freight shows up at

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the bills of lading and (2) did not prepare any of the bills. (Pet., p.23). However, the simple fact is that *Novolog* makes no mention of whether the alleged consignee received notice and does not address whether a misidentified consignee joins the transportation contract where it does not know it has been misidentified.

the tranloader's warehouse.[10] There is no reason to believe the Third Circuit would place transloaders in such a position.

Norfolk Southern's claim that the Eleventh Circuit's ruling "has left the nation's interline railroads with different rules and liabilities" (Pet., p. 11) is thus premature. The Third Circuit has not determined what impact a lack of notice has on a misidentified consignee's demurrage liability.[11] It is entirely possible the Third Circuit would reach the same conclusion reached by the Eleventh Circuit in *Groves*, or it may decide the issue in a way unforeseen by either party. Given the lack of conflicting opinions on this issue, this Court need not "resolve" a conflict where it is not clear any conflict exists. Allowing other courts, including the Third Circuit, to consider the issue might reveal there is no circuit split. If not, the additional attention these courts give to the question would assist this Court were it eventually to consider the issue.

This Court can give the circuit courts time to resolve this issue because there is no immediate impact on the nation's rail freight network. Norfolk Southern's sweeping claims to the contrary are

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[10] The Eleventh Circuit observed that "Norfolk routinely delivered freight to Savannah [Reload's] facility pursuant to bills of lading where Savannah [Re-Load] was not the named consignee." *Groves*, 586 F.3d at 1276-77.

[11] Norfolk Southern incorrectly claims Savannah Re-Load would be liable if it were physically located in the Third Circuit. (Pet., p. 22). There is no way to know how the Third Circuit would decide the instant case.

unfounded and contrary to the record. Putting aside the sub-issue of notice, the question of whether a party misidentified as consignee on a bill of lading can be held liable for demurrage appears to have been decided a total of eight times in the past ninety-nine years. The paucity of controversy prompted the Eleventh Circuit to observe that "research has disclosed very few opinions by federal circuit courts dealing with the narrow issue presented in this case." *Groves*, 586 F.3d at 1278 n.4. The issue of a consignee's knowledge is especially unlikely to cause problems going forward. The American Association of Railroads ("AAR") observed in its *amicus* brief that rail carriers already give "specific advance notice" of various kinds of information to freight recipients, so advising the recipients of their designation as consignee should add little burden. (Amicus Brief, p. 14).[12] If the AAR is correct, Norfolk Southern need not fear that the lack of notice on which the Eleventh Circuit based *Groves* will be replicated nationwide.

Finally, even if a conflict does exist, this narrow issue is best left to percolate further. This Court declined to issue a writ of certiorari following the

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[12] The American Association of Railroads, disregarding the record in this case, makes the bald claim that "[o]nly the alleged agent-consignee named as consignee in a bill of lading is aware of its putative agent-consignee status prior to its acceptance of the goods delivered by the carrier," (Amicus Brief, p. 14), and that Savannah Re-Load "simply declined," (Amicus Brief, p. 15), to notify Norfolk Southern that Savannah Re-Load was not the freight consignee. These statements overlook the undisputed, critical fact in the record on appeal that Savannah Re-Load was not aware of its consignee designation, a central part of the Eleventh Circuit's holding.

Novolog decision only two years ago. *Novolog Bucks County v. CSX Transp. Co.*, 552 U.S. 1183 (2008). The same considerations which dictated that denial should govern here.

B. Norfolk Southern Vastly Overstates The Impact Of The Eleventh Circuit's Opinion To The National Rail System Where Norfolk Southern Can Sue The Other Parties To The Transportation Contract, Does Not Determine Demurrage Liability Before Delivering Freight And Does Not Bill For Demurrage Based Upon Consignee Status.

Norfolk Southern greatly overstates the ramifications of the Eleventh Circuit's opinion. There is no adverse impact upon the nation's rail freight system if for no other reason than the carrier can always collect demurrage from someone other than the consignee. "[A]s an original party to the shipping contract, a consignor is clearly liable for demurrage." *Groves*, 586 F.3d at 1278. In those rare instances where the carrier experiences difficulty recovering from the consignee, the carrier thus can collect demurrage from other parties to the transportation contract, including the consignor.[13] "The most likely candidates would be the shippers themselves, with

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[13] Savannah Re-Load anticipates that Norfolk Southern will reply that its tariff does not permit it to collect from the consignor unless demurrage accrues at the origin. However, Norfolk Southern drafted the tariff and Savannah Re-Load should not be held responsible if Norfolk Southern did so in a self-limiting way. Norfolk Southern's decision to draft its tariff in this manner undermines its claim that its ability to collect demurrage cannot be compromised in any way.

whom [Norfolk Southern] had contracts and who were responsible for naming [Savannah Re-Load] as the consignee in the relevant bills of lading." *Carry Transit*, *supra*, at *14. Norfolk Southern's dire warnings of unworkable demurrage rules where it cannot ascertain the identity of the consignee from the bill of lading, (Pet., pp. 30-31), are unfounded.

Also unfounded are Norfolk Southern's claims that rail service will be disrupted because it is now forced to investigate and confirm the identity of the "true and consenting consignee before delivering loaded rail cars. . . ." (Pet., p. 21)(emphasis added). Norfolk Southern does not bill the consignee for demurrage; it bills whomever unloaded the rail car. (R-67, Ex. A, p. 76). In fact, Norfolk Southern does not even *look* at the bill of lading when collecting demurrage. *Id.* In effect, Norfolk Southern argues it is critically important that it be able to rely upon a document it does not use.[14]

Norfolk Southern similarly claims nationwide demurrage recovery efforts will be hindered if the consignee can simply deny having consented to that designation. (Pet., p. 25). Norfolk Southern's alleged

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[14] The record on appeal illustrates this point. Norfolk Southern routinely delivered freight to Savannah Re-Load where Savannah Re-Load was not named as consignee on the bills of lading. (R-67, Ex. A, p. 76). Yet it sued Savannah Re-Load for demurrage which allegedly accrued on those shipments. (R-1; R-67, Ex. A, p. 76). After Norfolk Southern filed suit, it realized Savannah Re-Load was not liable for demurrage on those deliveries and amended its complaint accordingly. (R-41; R-67, Ex. A, p. 76). Since Norfolk Southern must collect demurrage by law, (Pet., pp. 20-21), it presumably began collection efforts against the actual consignee, which necessarily occurred more than a year following delivery. The delivery itself was not affected.

handicap is illusory. As discussed above, Norfolk Southern is not limited to recovering demurrage from the consignee. Norfolk Southern, or any carrier, is free to collect demurrage from the other parties to the transportation contract. Additionally, the carrier is always capable of seeking discovery of information to disprove the freight recipient's statement that it had no knowledge it had been listed as consignee. The carrier might, through discovery, obtain emails, documents or statements from witnesses which demonstrate the defendant had pre-delivery knowledge it had been designated as consignee. Moreover, a consignee is much more than someone who simply consents to being listed on the bill of lading.[15] While that might be one way to establish liability for demurrage, a consignee is also vested with rights and obligations[16] which can be investigated through the use of discovery. Norfolk Southern seems to suggest that a consignee will have possession of the bill of lading.[17] (Pet., pp. 31-32).[18] If that be true,

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[15] "[C]onsignee status is more than a mere designation." *Groves*, *supra*, at 1281. "Consignment" means a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale. . . ." U.C.C. § 9-102(a)(20). The Uniform Commercial Code refers to a bill of lading as a "document of title." U.C.C. § 7-104 (2005). The Uniform Commercial Code recognizes that a warehouseman is a distinct entity. U.C.C. §7-102(a)(13) (2005).

[16] See footnote 5, *supra*.

[17] There is no dispute Savannah Re-Load did not receive the bill of lading, further proof it is not the consignee.

[18] Norfolk Southern makes the statement that "the law presupposes that the consignee 'has possession of the

proving the identity of the consignee may be as simple as determining to whom the consignor delivered the bill of lading.[19]

Norfolk Southern also argues that misidentified consignees will have no incentive to return rail cars promptly, defeating the purpose of demurrage. (Pet., p. 25). However, warehousemen such as Savannah Re-Load are paid to unload rail freight, (R-26, Ex. A, p. 1), and are therefore already incentivized to return empty rail cars as quickly as possible to get new cars for unloading. Moreover, it is not in the warehouseman's interest to permit demurrage to accrue. A warehouseman's client, whether a shipper, consignee, freight forwarding company or otherwise, is more likely to switch to a competitor if the warehouseman "misuse[s the rail cars] as free storage facilities," (Pet., p. 25), so as to permit demurrage to accrue.

[nonnegotiable] bill [of lading]' before delivery is made." (Pet., p. 32). However, Norfolk Southern cites no authority for this presupposition.

[19] Norfolk Southern claims the Eleventh Circuit opinion requires the carrier to provide the consignee with a copy of the bill of lading and that, in reality, the reverse should occur. (Pet., p. 32). However, the Eleventh Circuit did not reach this conclusion and made no such holding. To the extent notice is dispositive, Norfolk Southern can provide the necessary information to the warehouseman via facsimile, email, or any number of methods. The AAR admits that rail carriers already give "specific advance notice" of various types of information to freight recipients, so advising the recipients of their designation as consignee should add little burden. *See* Amicus Brief, p. 14.

C. The Eleventh Circuit Had Concurrent Jurisdiction To Rule On The Issue Norfolk Southern Brought Before It And Did Not Infringe On The STB's Jurisdiction By Deciding A Straightforward Matter Of Federal Law.

Norfolk Southern filed this lawsuit in the United States District Court for the Southern District of Georgia, asking the district court to enter judgment that Savannah Re-Load was liable for demurrage. When the district court ruled against it, Norfolk Southern appealed to the Eleventh Circuit. Now that the Eleventh Circuit has also ruled against it, Norfolk Southern takes the position for the first time that neither lower court had jurisdiction to decide the very issue Norfolk Southern put before it. It asks this Court to undo eighteen months of litigation and the work of two federal courts over a $70,000 claim, and to refer the case to the STB. Pet., pp. 26-30. At no time, either in filing the complaint (R-1), amending it (R-41), moving for partial summary judgment on Savannah Re-Load's consignee status (R-29; R-30), opposing Savannah Re-Load's motion for summary judgment on its consignee status (R-30), filing its appellate briefs or petitioning the Eleventh Circuit for a rehearing en banc, did Norfolk Southern ever advise either the district court or the circuit court that they lacked jurisdiction to determine this issue.

Norfolk Southern appears to take the position that federal courts can rule in favor of rail carriers on the issue of demurrage liability (R-29; R-30), but not against them. As Norfolk Southern's complaint made clear, however, it based jurisdiction on a federal question under 28 U.S.C. § 1331. (R-1, ¶¶ 1, 8; R-41,

¶¶ 1, 8). The district court and the Eleventh Circuit responded with an answer based upon federal law.

Norfolk Southern claims *Novolog* supports its jurisdictional argument in two ways. First, Norfolk Southern alleges *Novolog* distinguishes between primary and "exclusive" jurisdiction based upon whether the demurrage charges are assessed under an agreement—namely the transportation contract—versus a tariff. (Pet., p.29 n.25, *citing Novolog* 502 F.3d at 250, 252-53). *Novolog* makes no such distinction and the quoted material Norfolk Southern cites in footnote 25 of its petition appears in the opening paragraph of the opinion, not in the Third Circuit's treatment of jurisdiction. *See Novolog*, 502 F.3d at 250 ("The transloader objected to the assessment, arguing that it could not be subjected to charges under an agreement--***namely the transportation contract***--to which it was not a party.")(emphasis added). Second, Norfolk Southern claims Novolog provides that objections to jurisdiction based upon an argument that the STB's jurisdiction is exclusive can be raised at any point. (Pet., p. 29 n.25, *citing Novolog*, 502 F.3d at 253). Not only does Norfolk Southern misstate *Novolog*, which never mentioned the terms "exclusive jurisdiction," but the Third Circuit came to the conclusion that arguments based upon the STB's primary jurisdiction had been waived. *Novolog*, 502 F.3d at 253.

The jurisdictional issue Norfolk Southern raises does not warrant a grant of its petition because the district court had jurisdiction to grant summary judgment in Savannah Re-Load's favor. At this late date, the policies underlying the doctrine of primary jurisdiction are not served by referring this case to the

STB. Moreover, this case does not present issues requiring the STB's unique expertise. In arguing that the district court and the circuit court lacked jurisdiction to hold Savannah Re-Load was not the consignee, (Pet., p. 30), Norfolk Southern mistakenly equates the "exclusive jurisdiction" granted the STB by 49 U.S.C. § 10501(b) to subject matter jurisdiction (Pet., p. 29 n.25). To the contrary, federal district courts and the STB have concurrent jurisdiction over ICCTA claims. *Pejebscot Indust. Park, Inc., v. Main Central R.R. Co.*, 215 F.3d 195, 200-05 (1st Cir. 2000) (holding, after exhaustively reviewing the legislative history of 49 U.S.C. § 10501(b) and related statutes, that concurrent jurisdiction exists despite language in 49 U.S.C. § 10501(b) that gives the STB "exclusive" jurisdiction over any claim involving "transportation by rail carriers").

Primary jurisdiction, which was the doctrine discussed in *Novolog*, does not strictly limit the power of the courts but rather is intended to "serve as a means of coordinating administrative and judicial machinery and to promote uniformity and take advantage of the agencies' special expertise." *Pejebscot Indust. Park, Inc.*, 215 F.3d at 205 (internal quotation marks and citation omitted).

> The doctrine of primary jurisdiction determines whether the federal court will refrain from exercising its unquestioned jurisdiction over a dispute until after an administrative agency has resolved some question arising in the proceeding before the court. It represents a recognition of the need for an orderly coordination between the functions of

> court and agency in securing the objectives of their often overlapping competency.

Interstate Commerce Comm'n v. All-American, Inc., 505 F.2d 1360, 1362 (7th Cir. 1974).

When a claim is cognizable in both federal court and an administrative agency, the district court "may, under appropriate circumstances, determine that the initial decisionmaking responsibility should be performed by the relevant agency rather than the courts." *Syntek Semiconductor Co. v. Microchip Tech., Inc.*, 307 F.3d 775, 780 (9th Cir. 2002). This determination should occur when the issue "involves the special expertise of the agency and would impact the uniformity of the regulated field." *DeBruce Grain, Inc. v. Union Pac. R.R. Co.*, 149 F.3d 787, 789 (8th Cir. 1998). In contrast, "[a]pplication of the doctrine has been refused when the issue at stake is legal in nature and lies within the traditional realm of judicial competence." *Goya Foods, Inc. v. Tropicana Prod., Inc.*, 846 F.2d 848, 851-52 (2nd Cir. 1988)(citing *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304 (1976)). The doctrine does not

> require[] that all claims within an agency's purview . . . be decided by the agency." (internal citation and quotation marks omitted) Nor is it intended to 'secure expert advice' for the courts from regulatory agencies every time a court is presented with an issue conceivably within the agency's ambit. (internal citation and quotation marks omitted) Rather, it is a "doctrine used by the courts to allocate initial decision making responsibility between agencies and courts where such [jurisdictional] overlaps and

> potential for conflicts exist." Richard J. Pierce, Jr., *Administrative Law Treatise* § 14.1, p. 917 (4th ed. 2002).

Syntek Semiconductor Co., Ltd., 307 F.3d at 780 (9th Cir. 2002)(emphasis added).

Unlike subject matter jurisdiction, primary jurisdiction is discretionary. "No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956). Because the courts have discretion to refrain from invoking primary jurisdiction, its specter does not automatically oust the courts of jurisdiction as a lack of subject matter jurisdiction would do. *Compare Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 366 n.10 (1994)(declining to invoke the doctrine of primary jurisdiction), *with Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1945 (2009)("We are not free to pretermit the question. Subject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt."); *see also United States v. Bessemer & Lake Erie R.R. Co.*, 717 F.2d 593, 599 (D.C. Cir. 1983)("The doctrine of primary jurisdiction, despite what the term may imply, does not speak to the jurisdictional power of the federal courts."). Thus, contrary to Norfolk Southern's argument, the Eleventh Circuit did not "render[] a judgment beyond its power." (Pet., p. 30).

At this point, after obtaining final rulings from the district court and the circuit court, any question of whether this case should be referred to the STB is

moot. "No coordination would be achieved by requiring a District Court, *after* it has rendered a judgment, to vacate that judgment upon motion and refer a question it has already decided to an agency." *Novolog*, 502 F.3d at 253 (emphasis by the court). Any special expertise of the STB is of limited value where, as here, a federal court's opinion "involve[d] the analysis of precedent and statutory interpretation." *See Novolog*, 502 F.3d at 253. Thus, the doctrine of primary jurisdiction does not condone, let alone mandate, giving Norfolk Southern a third bite at the apple.

Putting aside the limited utility of a referral to the STB, primary jurisdiction does not present grounds for a writ of certiorari because the Eleventh Circuit's decision does not interpret or expand the terms of Norfolk Southern's tariff (Pet., p. 22). The Eleventh Circuit's ruling does not purport to redefine, interpret, or alter Norfolk Southern's tariff. It simply holds that, without notice, Savannah Re-Load cannot be deemed to have joined the transportation contract, a holding which requires no reference to the tariff.

The Eleventh Circuit's holding that Savannah Re-Load is not liable for demurrage does not "implicitly" interpret Norfolk Southern's tariff any more than a ruling in Norfolk Southern's favor would have "implicitly" interpreted the tariff differently. Norfolk Southern claims this case is "nearly identical" to *Novolog* (Pet., p. 23), yet there the district court had held "that its decision did not amount to a finding that CSX's rates were unreasonable." *Novolog*, 502 F.3d at 253. The Third Circuit agreed, holding that "the STB's expertise, while helpful, would not have been crucial to the determination of the issues here, which involve the

analysis of precedent and statutory interpretation." *Id.*

Norfolk Southern chose to have the federal courts decide this case, and the courts below have devoted substantial time and energy to deciding it. Norfolk Southern should not now be permitted to avoid the result it dislikes by urging it should have been before the STB.

D. The Eleventh Circuit Did Not Depart From The Accepted And Usual Course Of Judicial Proceedings By Holding Savannah Re-Load Could Not Join A Contract Where It Did Not Know It Had Been Identified As Consignee On The Relevant Bills Of Lading.

Norfolk Southern claims the Eleventh Circuit's holding is "novel"[20] and results in an "unworkable" rule of demurrage, and constitutes a departure from the accepted and usual course of judicial proceedings. (Pet., p. 30). The circuit court, however, did not depart from the accepted and usual course of judicial proceedings. To the contrary, it declined to depart from the rule having the "greatest support in the case

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[20] Although Norfolk Southern criticizes the Eleventh Circuit for coming up with a "novel definition of consignee," (Pet., pp. 30, 32), it also claims the court "fails to even define who is a consignee." (Pet., p. 34). But the court was never asked to define "consignee." Instead, the limited issue which the Eleventh Circuit considered was "whether Savannah [Re-Load] was a consignee of the freight delivered by [Norfolk Southern]." *Groves*, 586 F.3d at 1279. As the court noted, there was only a "narrow issue presented in this case." *Id.* at 1278, n.4.

law."[21] *Groves*, 586 F.3d at 1282. The circuit court upheld "several fundamental principles of law that define demurrage liability." *Id.* at 1278. It reaffirmed that "demurrage is considered part of the transportation charge and under the tariff system is imposed as a matter of law." *Id.* It also upheld longstanding law that "[l]iability for freight charges may be imposed only against a consignor, consignee, or owner of the property, or others by statute, contract, or prevailing custom." *Id.* (quoting *Evans Prods. Co. v. I.C.C.*, 729 F.2d 1107, 1113 (7th Cir. 1984). It affirmed longstanding boundaries on demurrage claims, noting that "[b]efore such transportation-related assessments such as detention charges can be imposed on a party ... there must be some legal foundation for such liability outside the mere fact of handling the goods shipped." *Groves*, 586 F.3d at 1278 (quoting *Middle Atl. Conference v. United States*, 353 F. Supp. 1109, 1118 (D.D.C. 1972)(three-judge panel)).

The circuit court's opinion did not change the basic law that an "entity must be a party to the transportation contract to be liable for demurrage charges [and] that a consignee becomes a party to the transportation contract upon accepting the freight consigned to it. . . ." *Id.* at 1279. It did not change the carrier's ability to recover demurrage or its ability to collect it from the consignee. It simply declined to take the narrow view that a bill of lading, meant to reflect

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[21] As described above, courts have rejected carriers' attempts to collect demurrage from entities misidentified as consignees on the relevant bills of lading for at least ninety-nine years.

the consignee designation, should instead conclusively determine it.[22]

Given demurrage's contractual underpinnings, the circuit court observed that "it is a fundamental principle of contracts that in order for a contract to be binding and enforceable, there must be a meeting of the minds on all essential terms and obligations of the contract." *Groves*, 586 F.3d at 1281 (quoting *Browning v. Peyton*, 918 F.2d 1516, 1521 (11th Cir. 1990)). Its holding that a party who does not consent to or know of its consignee designation cannot join the transportation contract is hardly novel. It reflects the fundamental tenant of contract law that "a contract cannot bind a nonparty." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).

Norfolk Southern complains because the circuit court's opinion requires it to do just what the law has historically required rail carriers to do: sue the consignee, not someone who has been incorrectly identified as such. This requirement is not "unclear" or "unworkable." Demurrage does not give rise to a strict liability claim against an entity which might be identified in a bill of lading it had no hand in creating. Demurrage is based in contract,[23] and rail carriers are no different from any other plaintiff bringing a lawsuit based in contract. Norfolk Southern must shoulder its

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[22] Norfolk Southern provides several definitions of "consignee," (Pet., p. 32-33), none of which, other than that of the *Novolog* court, were given with this issue in mind

[23] "The parties agree that an entity must be a party to the transportation contract to be liable for demurrage charges. . . ." *Groves*, *supra*, at 1279.

burden of proving the defendant was bound by the terms of the transportation contract.[24] The policies behind demurrage do not call for a departure from the accepted and usual course of requiring a litigant to sue the proper party.

CONCLUSION

This case involves a relatively unique factual situation, unlikely to occur on a repetitive, nationwide basis. Only one circuit court has addressed the precise issue raised in this petition, and this issue would benefit from additional circuit court treatment. In the meantime, the Eleventh Circuit's opinion has modest, if any, ramifications for the national rail freight network. These factors, plus the absence of any jurisdictional issues, render this case unworthy of a writ of certiorari.

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[24] Norfolk Southern defines "consignee" as "[t]he party to whom a shipment is consigned or the party entitled to receive the shipment." (Pet. pp. 32-33)(emphasis added). This definition can be read one of two ways. If "party" refers to a party to a contract, it would not apply to a misidentified consignee since that entity is not a "party" to the contract. If "party" is defined otherwise, Norfolk Southern's tariff is broader than the law allows, as "party entitled to receive the shipment" would include non-parties to the transportation contract who are entitled to receive the shipment.

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IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

BILLY GROVES, INDIVIDUALLY,
DBA SAVANNAH RE-LOAD, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

The United States does not deny that the Petition presents a square, acknowledged conflict of authority. Pet. 22-26. The rule "for several decades" was that a warehouseman "shown as a consignee in the bill of lading" was "subject to demurrage or detention charges." U.S. App. 5a, 6a. In the decision below, which the United States does not defend, the Eleventh Circuit departed from that "well accepted" rule. *Id.* 5a; see *id.* 6a-7a; U.S. Br. 7-8. Fundamentally, therefore, the national rail system now is governed by different rules in different States: A railcar moving from Pennsylvania to Georgia operates under different demurrage rules than a railcar traveling in the opposite direction. The United States does not deny that this conflict implicates the movement of more than a million railcars and billions of tons of freight per year. Pet. 10. In fact, it agrees that "[t]he efficiency of railroads and the prevention of undue detention of railcars are matters of national importance." U.S. Br. 3; see Pet. 17, 25-26 (discussing importance of the issue and consequences of the decision below); AAR Br. 3-7 (same). These are the traditional reasons to grant certiorari, and that is what the Court should do.

The United States' sole basis for recommending denial of certiorari is that the STB has "issued an Advance Notice of Proposed Rulemaking" (ANPR). U.S. Br. 8. Although the STB "has long been involved in resolving demurrage disputes," U.S. App. 3a, and "[t]he decision below was rendered over a year ago," U.S. Br. 18, the STB first determined to "explore" the issue, U.S. App. 9a, one week before the United States filed its invitation brief. The ANPR provides no basis to deny certiorari. By its terms, the STB has

not committed to take any action at all. Even if some rulemaking were to ensue, it is unclear when that might happen. And, there is no reason to believe that any action the STB does take will "resolve" the conflict. *Id.* 9-10. For instance, the courts of appeals (including especially the Eleventh Circuit) may well disagree with any conclusion the STB reaches. Presumably for these same reasons, the Court in the past has granted certiorari notwithstanding possible action by another branch of government.[1] It should do likewise here.

1. First and foremost, it is far from clear that the STB will take any action to resolve the circuit split (even if it could, *infra* 7-8). Its action to date is purely tentative: The STB did not issue even a standard Notice of Proposed Rulemaking, but rather only an *Advance* Notice of Proposed Rulemaking. U.S. App. 1a. An ANPR is "a third stage to the rulemaking process ... that solicits comments on a general problem but proposes no solution." Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 Harv. L. Rev. 1059, 1065 (1986); see James T. O'Reilly, *Administrative Rulemaking* § 5:6, at 136 (2d ed. 2010) (an ANPR "announces the agency's general ideas and approaches on a topic, and opens a period of informal public

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[1] *Compare, e.g., Knight* v. *Comm'r*, 551 U.S. 1144 (2007) (granting certiorari), *with* Reply Br. *4-7, *Knight*, 2007 WL 1594328 (discussing draft NPR the United States asserted as a basis for denying certiorari); *and Wis. Dep't of Health & Family Servs.* v. *Blumer*, 553 U.S. 927 (2001) (granting certiorari), *with* U.S. Br. as *Amicus Curiae*, *Blumer*, 2001 WL 34136615 (HHS "plans promptly to promulgate regulations addressing the question presented here"). *See also Rush Prudential HMO* v. *Moran*, 533 U.S. 948 (2001) (granting certiorari notwithstanding pending legislation); *Thomas* v. *Outboard Marine Corp.*, 479 U.S. 811 (1986) (same).

comments"). This ANPR follows that pattern. Far from promising rulemaking, the "agency's intent" is to "adopt a rule *or policy statement*." U.S. App. 1a (emphasis added). The STB is "instituting this proceeding to explore *whether* [it] should look to a new way of determining the liability of warehousemen for demurrage." *Id.* 9a (emphasis added).

In short, there is no reason to assume that the STB will issue any new rules. Like other agencies, the STB in the past has issued ANPRs that did not result in NPRs,[2] and NPRs that did not result in rules.[3] See generally Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 Yale J. on Reg. 1, 40-41 (1989) ("Agency administrators can use the [ANPR] process, which can last from six months to a year, to avoid hard decisions. Invoking the ANPR process demonstrates some movement by the Agency, but does not necessitate any final decisions."). Nothing in the United States' brief is to the contrary. It states that the STB has "recently *initiated* a rulemaking *proceeding*." U.S. Br. 5 (emphases added). It floats the possibility of actions the STB might take—for instance,

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[2] *E.g.*, *Class Exemption for Expedited Abandonment Procedure for Class II and Class III Railroads*, Ex Parte No. 647, 2006 STB LEXIS 772 (Dec. 15, 2006); *Petition For Rulemaking—Invoiceless Billing Transactions*, Ex Parte No. 55 (Sub-No. 95), 1997 STB LEXIS 65 (Apr. 15, 1997).

[3] *E.g.*, *Interpretation Of The Term "Contract" In 49 U.S.C. 10709*, Ex Parte No. 669, 2007 STB LEXIS 138 (Mar. 29, 2007) (NPR); 2008 STB LEXIS 131 (Mar. 12, 2008) (declining to adopt rules; discontinuing proceedings); *Rail Transportation Contracts Under 49 U.S.C. § 10709*, Ex Parte No. 676, 2008 STB LEXIS 763 (Jan. 6, 2009) (further, related NPR); 2010 STB LEXIS 19 (Jan. 22, 2010) (declining to adopt rules; discontinuing proceedings).

that the STB "is open to reconsidering" prior decisions of the Interstate Commerce Commission, see *id.* 17. That the Solicitor General is left to speculate in this fashion only confirms the inherent uncertainty about whether the ANPR will lead to meaningful agency action.

That speculation stands in direct contrast to the absolute certainty that unless this Court acts, the important conflict will persist, leaving the national rail system to operate under different rules depending upon location. The Third Circuit properly embraces the rule—which, the STB acknowledges, long ago "became well accepted," U.S. App. 5a; see Pet. 13-16 & nn.9-11—that a consignee that accepts a shipment is liable for demurrage. This rule makes good sense—consignees do not receive railcars by accident. They are businesses served by railroad tracks and, obviously, railroads deliver shipments that the consignee contracted to receive. The consignee is receiving freight from the shipper, not the railroad: "[T]he warehouseman is the one who has the relationship with the shipper, and it should not be the carrier's responsibility to investigate whether the relationship described in the bill of lading accurately reflects the de facto status of the parties." U.S. App. 8a; AAR Br. 14-15 & n.13. The Eleventh Circuit squarely rejects this rule, Pet. App. 17a, holding instead "that a party shown as a consignee in the bill of lading is not in fact a consignee unless it expressly agreed to the terms of the bill describing it as a consignee." U.S. App. 6a; see Pet. App. 19a.

At best, the result is intolerable disuniformity, directly contrary to the longstanding congressional policy of "uniformity in charges for transportation." *Pittsburgh, C.C. & St. Louis Ry.* v. *Fink*, 250 U.S. 577, 582 (1919). At worst, the Eleventh Circuit's er-

roneous rule will govern nationwide if, as a simple matter of business reality, the need for uniform procedures forces railroads to investigate the status of the named consignee to comply with the Eleventh Circuit's notification rule. The United States effectively concedes that such dislocations may result, speculating that problems "could perhaps be mitigated by ... carriers through modifications of their notification procedures." U.S. Br. 18-19. But, as the STB itself acknowledges, the Eleventh Circuit's approach "is unsatisfying in various ways," and "it should not be the carrier's responsibility to investigate." U.S. App. 8a; see also AAR Br. 13-14 (identifying potential problems with implementing a solution).[4]

2. Not only is it unclear how, if at all, the STB will act; it also is unclear *when* it might do so. The United States says "the Board intends to act quickly." U.S. Br. 19. That is not quite right. The STB has asked for comments *related to the ANPR* by late February. U.S. App. 1a. But an actual rulemaking could not be completed for months or years, if at all. Following the ANPR, the STB would have to issue an NPR, then undertake the lengthy process of drafting and issuing actual rules. O'Reilly, *supra*, at 136

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[4] Elsewhere the United States downplays the significance of the circuit split, asserting that "[l]itigation ... has been relatively sparse." U.S. Br. 18. This is only true because previously, there was an "accepted rule," U.S. App. 6a, whereas now, there is "legal uncertainty," U.S. Br. 10. That alone merits this Court's review, *see* Sup. Ct. R. 10(a), and particularly where the Eleventh Circuit has drawn a roadmap for every warehouseman to contest previously settled liability. Moreover, warehousemen in the Eleventh Circuit now have no incentive to return cars in a timely fashion, U.S. App. 8a, which will have significant implications for transportation throughout the Eastern half of the United States.

(ANPR is "a preparatory step, antecedent to a potential future rulemaking"); Morrison, *supra*, at 1065 (ANPR "adds a further layer of delay onto every rulemaking effort"); Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. Pitt. L. Rev. 589, 636 (2002) (when an ANPR issues, "[a]gencies must delay in-depth analysis of specific proposals and will ultimately need to complete multiple rounds of notice and comment"). For example, in a previous rulemaking addressing demurrage, the ICC issued an ANPR in December 1985; an NPR six years later; and ultimately the STB dismissed the proceeding another four years after that.[5] Here, the United States confesses that the STB has gone more than two years without resolving an adjudicatory proceeding presenting nearly the same issue. U.S. Br. 5, 15 n.3.

The prospect of such delay and uncertainty is further reason not to await potential agency action. There is an immediate need to maintain a national rail system for which uniformity is longstanding congressional policy. Permitting the rail system to be subject to inconsistent and conflicting rules dictated

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[5] *See Exemption Of Demurrage From Regulation*, Ex Parte No. 462, 50 Fed. Reg. 51,565 (Dec. 18, 1985); 57 Fed. Reg. 14,688 (Apr. 22, 1992); 61 Fed. Reg. 14,200 (Mar. 29, 1996).

On another occasion, more than four years passed between the ANPR and the final rule. *Safe Implementation of Board-Approved Transactions*, Ex Parte No. 574, 6 S.T.B. 129, 131 (2002). *See also supra* 3 n.3 (three years between NPR and ultimate dismissal of proceeding without rulemaking). The STB's docket currently includes at least one rulemaking in which an ANPR has been pending nearly two years without further agency action. *See Class I Railroad Accounting And Financial Reporting—Transportation Of Hazardous Materials*, Ex Parte No. 681, 74 Fed. Reg. 248 (Jan. 5, 2009).

by location until the STB acts—if it ever does—is unjustifiable.

3. Such delay is all the more unacceptable because it is far from clear that the STB's action will "resolve the issue," *id.* 9. The STB itself makes no such promise; as discussed above, it simply commits to study it. *Supra* 2-3; see generally U.S. App. 10a-12a. There are multiple reasons to doubt whether the agency will act in a way that could take this issue out of the courts.

First, a tentative action such as issuing a "policy statement," U.S. App. 1a, would not resolve this conflict. The United States invokes *Chevron*, U.S. Br. 17-18, but an ANPR, a policy statement, or other preliminary agency action is unlikely to merit such deference. See *Christensen* v. *Harris Cnty.*, 529 U.S. 576, 587 (2000); cf. Stern, *supra*, at 634 ("The ANPR does not qualify as a proposed rule and therefore is not subject to the requirements of the APA. In addition, because an ANPR is not a final rule, it is generally not subject to judicial review because it is not ripe for such review.").

Indeed, there is serious reason to question whether the STB could or would undertake the type of proceeding (such as notice-and-comment rulemaking) that would deserve significant deference. This is because the ICC Termination Act mandates that it is the rail carriers that must establish demurrage rates and rules:

> A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall compute demurrage charges, and establish rules related to those charges ....

49 U.S.C. § 10746.[6] Those rates are contained in tariffs that the STB reviews for reasonableness on a case-by-case basis,[7] and never has the STB (or its predecessor the ICC) established rules governing the reasonableness of demurrage on an industry-wide basis. That undoubtedly is why the STB here has not committed to do anything more than solicit comment to consider the issue. Thus, even if the STB ultimately issues rules, their validity may well be challenged, thereby further delaying resolution of an issue that this Court could put to rest by June 2011.

Second, even if the STB did ultimately decide to promulgate rules, it is uncertain whether the Eleventh Circuit and courts employing its reasoning would defer to the agency. The Eleventh Circuit held—as a "tenent [sic] of contract law," Pet. App. 18a—that "a party must assent to being named as a consignee on the bill of lading to be held liable as such, or at the least, be given notice that it is being named," *id.* 19a. If such notice is now required as a tenet of contract law and as an aspect of the definition of "consignee," notwithstanding the definition in a railroad's tariff, then even decisive and definitive action by the STB would not necessarily cause the Eleventh Circuit to reverse course. *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("[P]rior judicial construction of a statute trumps an agency construction ... if the prior court decision holds that its construction follows from

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[6] Here, the Norfolk Southern tariff was by its plain terms applicable: It assesses demurrage charges "against the ... consignee at destination," and defines consignee as "[t]he party to whom a shipment is consigned." Pet. 9.

[7] *See* 49 U.S.C. § 10704(a)(1) ("the Board, after a full hearing," may "decide[] that a rate charged or collected by a rail carrier for transportation ... does or will violate this part").

the unambiguous terms of the statute."); *Sierra Club* v. *EPA*, 479 F.3d 875, 880-81 (D.C. Cir. 2007) (declining to defer to subsequent agency interpretation).

On the contrary, the Eleventh Circuit's approach raises serious question whether a statement by the agency would carry the day. Under the statute, any evaluation of a tariff's reasonableness is committed "exclusive[ly]" to the agency. 49 U.S.C. § 10501(b); see Pet. 28 & n.24. Interpretation of the railroad's tariff is for the Board; a federal court has only limited jurisdiction "to enforce liability" "for payment of rates," 49 U.S.C. § 10743(a), (c).[8] Here, however, the Eleventh Circuit took it upon itself to determine when demurrage charges may be assessed against a named consignee, notwithstanding the plain terms of the tariff. There is little reason to think that a court

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[8] The United States does not contest that the Board's jurisdiction here was exclusive, nor that this jurisdictional issue is nonwaivable. U.S. Br. 12. It recites the rule of *Pejepscot Industrial Park* v. *Maine Central Railroad*, which held that the STB does not have exclusive jurisdiction to consider a different issue arising under a different provision of the ICC Termination Act. 215 F.3d 195, 197, 205 (2000) (discussing 49 U.S.C. § 11101). Conspicuously, the United States does not embrace *Pejepscot*; it simply says the issue does not independently merit review. But it confesses that "if the Court were to grant review on the substantive question of demurrage liability, it would be appropriate to grant review on this threshold question as well." U.S. Br. 12.

The United States questions the scope of Norfolk Southern's position on exclusive jurisdiction, *see id.* 12 n.1, but any uncertainty stems from the decision below, not the Petition. The Eleventh Circuit rejected the plain terms of Norfolk Southern's tariff, effectively ruling them to be unreasonable as a matter of federal law. But, the reasonableness of tariff terms is committed exclusively to the STB. *Supra* 9. That the Eleventh Circuit did not speak explicitly in such terms is a function of its radical departure from the statutory scheme.

that has made this most basic error will find it necessary or appropriate to follow the Board.

The United States' repeated invocation of "specialized industry knowledge" is misplaced. *E.g.*, U.S. Br. 15. Such expertise may be relevant to "establish[ing] a comprehensive demurrage policy," *id.*, but that is not the question presented here. The simple question before the Court is whether the statute requires a court to disregard the plain terms of Norfolk Southern's tariff. This is a garden-variety question of law that is within the heartland of this Court's supervisory authority. The United States observes, in the height of understatement, that "[t]his is not to say that courts have no role to play in the regulation of demurrage." *Id.* 18. But courts are not limited to judicial review of agency action, *id.*; it is particularly within this Court's "role" to resolve whether the Eleventh Circuit erred when it answered the question presented in direct conflict with the Third Circuit. Doing so will not, as the United States intimates, prevent the STB from "get[ting] an accurate picture of industry practices," "adopt[ing] revised bill-of-lading practices," or "reconsider[ing] old regulatory precedent." *Id.* 16-17. The STB can consider such issues regardless whether this Court grants review. In the meantime, however, there exists a square and acknowledged conflict of authority on a basic question of law, concerning the accrual of liability across the national rail system for holding rail cars, which this Court should promptly resolve.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE

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NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

BILLY GROVES, individually, d.b.a. Savannah Re-Load,
SAVANNAH RE-LOAD, and
BRAMPTON ENTERPRISES, LLC,
d.b.a. Savannah Re-Load,

Respondents.

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Corporate Disclosure Statement was set forth at page *iii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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INTRODUCTION

Petitioner, Norfolk Southern Railway Company ("Norfolk") asks this Court to resolve a split in authority created by the Eleventh Circuit's decision in this case. That decision imposes inconsistent obligations upon rail carriers and shippers depending upon the circuit in which rail cars are located. Norfolk also asks this Court to review the decision for improperly encroaching upon the exclusive jurisdiction of the Surface Transportation Board ("STB"). Finally, Norfolk seeks review from this Court because the decision constitutes a significant departure from the accepted definition of "consignee" which the STB and the industry have followed for decades.

Respondent, Brampton Enterprises, LLC ("Brampton") opposes certiorari. In its brief, Brampton attempts to reconcile directly conflicting holdings of the Third and Eleventh Circuits in an attempt to extinguish the circuit split and minimize the effect of the Eleventh Circuit's ruling on the otherwise uniform law relating to interstate rail transportation. Brampton also argues that the Eleventh Circuit's ruling faithfully applies a century of precedent despite the fact that it introduces a definition of the term "consignee" which is unprecedented. Finally, Brampton conflates the doctrines of primary and exclusive jurisdiction. This brief addresses new points raised in Brampton's brief.

ARGUMENT

A. Brampton's Response Rejects the Eleventh Circuit's Recognition of a Conflict Among the Third, Seventh, and Eleventh Circuits

Brampton curiously asserts that "there is no split of authority between the Eleventh Circuit and Third Circuit." Opposition ("Opp."), p., 9.

In *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247 (3d Cir. 2007), *cert. denied*, 128 S.Ct. 1240 (2008), a rail carrier, CSX, delivered freight to an entity identified as the consignee of freight on bills of lading, *i.e.*, Novolog. Novolog did not own the freight[1] or consent to being identified as consignee on the bills of lading which were prepared by another entity.[2] Novolog, however, accepted delivery of the freight.[3] Prior to accepting delivery, Novolog did not provide CSX with: (1) notice that Novolog did not own the freight, (2) notice that Novolog was acting as an agent for another party, or (3) the name and address of that other party. These notice requirements are set forth in the Interstate Commerce Act at 49 U.S.C. § 10743(a)(1).

The Third Circuit held that "recipients of freight who are named as consignees on bills of lading are subject to liability for demurrage charges arising after they accept delivery *unless* they act as agents of another

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[1] *Novolog*, 502 F.3d at 250-251.

[2] *Id.*, at 252.

[3] *Id.*, at 250.

and comply with the notification procedures established in . . . § 10743(a)(1)." *Novolog*, 502 F.3d at 254 (emphasis added). The Third Circuit held that such entities are "presumptively responsible" for demurrage. *Id.*, at 259. The Third Circuit acknowledged that the Seventh Circuit had held that simply being identified as consignee on some bills of lading was not enough to render that named consignee liable for demurrage in the absence of "other factors." *Id.*, at 260 (*citing Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813 (7th Cir. 2003)). The Third Circuit expressly rejected the Seventh Circuit's "designation-plus" standard and held no "other factors" were relevant to determining whether a party named as a consignee on a bill of lading was, in fact, a consignee for purposes of determining demurrage liability. *Id.*

In this case the Eleventh Circuit reached a conclusion opposite that of the Third Circuit. Here, it is undisputed that Brampton: accepted delivery of freight from Norfolk;[4] was identified as a consignee on *every* bill of lading relating to rail cars for which demurrage is sought;[5] did not own the freight;[6] did not consent to being identified as consignee on the bills of lading which were prepared by another entity;[7] and, did not provide

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[4] *Groves*, 586 F.3d at 1275.

[5] *Id.*, at 1276.

[6] The *Novolog* Court noted that "It goes without saying that Novolog's lack of ownership of the freight is immaterial, since . . . [§ 10743(a)(1)] is specifically directed at consignees 'not having beneficial title to the property.'" *Novolog*, 502 F.3d at 257, n. 10 (citation omitted).

[7] *Groves*, 586 F.3d at 1276.

Norfolk with the notice required under § 10743(a)(1) prior to accepting delivery.[8] Under these parallel circumstances, the Eleventh Circuit held that Brampton was not liable because it had not been "given notice that it has been listed as a consignee by third parties" and expressly rejected the "*Novolog* rule of presumptive liability." *Norfolk Southern v. Groves*, 586 F.3d 1273, 1280 (11th Cir. 2009).[9]

Brampton argues that *Groves* and *Novolog* do not conflict because Brampton claims that it was not given notice that it had been named as consignee on the bills of lading. Brampton argues that this factor was not discussed in *Novolog* and, thus, that "The Third Circuit's reasoning does not cover the 'lack of knowledge' situation present here." Opp., p., 10. This argument completely misses the mark. The Third Circuit did not discuss whether Novolog had notice that it was named as consignee on the bills of lading because the court held that this "other factor" is completely irrelevant to a determination of whether Novolog was a consignee for purposes of demurrage liability. The Eleventh Circuit, on the other hand, found this "other factor" to be dispositive of whether Brampton was a consignee and reached a diametrically opposed holding.

While both the Third and Eleventh Circuit agree that a consignee is liable for demurrage, the courts expressly disagree on the fundamental question of what makes an entity a consignee. Under the *Novolog* rule,

[8] *Id.*

[9] *Groves* is reproduced in the Appendix to the Petition for Writ of Certiorari at 1a-21a.

Brampton is a consignee because it is identified as a consignee on the relevant bills of lading and accepted delivery of the freight. Under *Groves*, Brampton is not a consignee despite its designation as such on the bills of lading, and its acceptance of the freight.

The Eleventh Circuit expressly recognized in *Groves* that "The Seventh and Third Circuits reached differing conclusions on this issue [*i.e.*, whether a party becomes a consignee simply by being named as such on a bill of lading and accepting delivery] *resulting in a conflict of authority among the two circuits*." *Groves*, 586 F.3d at 1280 (*citing South Tec*, 337 F.3d at 821) (*and citing Novolog*, 502 F.3d at 262) (emphasis added). The Third Circuit requires the named consignee to provide the notice specified in § 10743(a)(1) to the rail carrier in order to avoid demurrage liability. Conversely, the Eleventh Circuit requires the rail carrier to provide notice to the consignee named on the bill of lading that it has been so identified in order to render the consignee liable for demurrage.

Norfolk requests that this Court exercise its power to resolve the circuit split on this important question, and restore uniformity in interstate commerce. The circuit split has only widened since a petition for certiorari was last presented to this Court. *See* 128 S. Ct. 1240 (denying certiorari in *Novolog*).

B. Brampton's Response Minimizes the Adverse Impact of the Eleventh Circuit's Ruling on the National Freight Rail Network

The sheer amount of demurrage accrued through undue detention of the nation's limited supply of freight rail cars is staggering. In 2008, four of the larger freight railroads in the U.S. collected $432.2 million in demurrage.[10] Brampton claims that Norfolk will simply collect demurrage from some other entity. Brampton muses that the "most likely candidates would be the shippers themselves, with whom Norfolk Southern had contracts and who were responsible for naming [Brampton] as the consignee in the relevant bills of lading." Opp., pp. 13-14. Of course, this proposition ignores several realities. First, delivering carriers like Norfolk typically have no contractual relationship with the shipper if the transportation begins on another rail carrier's line.[11] It is much more likely that Brampton had a contractual relationship with the shipper. Second, the shipper has no control over the rail car and whether demurrage is allowed to accrue by a receiver such as Brampton. Third, the railroad that is merely

[10] This information is reported to the STB by Class I railroads in Annual Report R-1 (line 6 of schedule 210) which are publicly available at http://www.stb.dot.gov/econdata.nsf/f039526076cc0f8e8525660b006870c9?OpenView&Start=1&Count=300&Expand=2#2. Last visited July 7, 2010. The carriers collected the following amounts of demurrage in 2008: Norfolk ($129.1 M); BNSF ($128.3 M); CSX ($68.1 M), and; Union Pacific ($106.5 M).

[11] Such "interline" transportation is the norm given that there are 563 freight railroads in the United States. Pet., p. 10, n. 2.

transporting the goods from origin to destination should not have to be in the middle of a dispute over who is the actual consignee – a determination in which the railroad does not participate and into which the railroad had no transparency.

Brampton disingenuously claims that warehousemen like itself will not allow demurrage to accrue because they are "incentivized to return empty rail cars as quickly as possible to get new cars for unloading." Opp., p. 16. This argument ignores the realities of the marketplace and is betrayed by Brampton's admission that it improperly detained rail cars in this case, thus accruing demurrage. In practice, a warehouseman's purported incentives do nothing to discourage the undue detention of rail cars as such cars often serve as supplemental warehouse facilities.

Under the Eleventh Circuit's decision, named consignees need only deny consenting to be so named (and not comply with the statutory scheme for decertifying itself as consignee) and then hold rail cars with indifference to the consequences. Brampton's arguments that such misuse will not ensue are belied by the existence of cyclical rail car shortages[12] and the uncontroverted facts of this case.

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[12] *See Investigation of Adequacy of Freight Car Ownership*, 323 I.C.C. 48 (1964) ("Car shortages of varying duration and severity have been with us for decades and in every national emergency.")

C. Brampton's Argument Relating to Primary Jurisdiction Fails to Address the Eleventh Circuit's Encroachment Upon the STB's Exclusive Jurisdiction Regarding Interpretation of Tariff Provisions

Norfolk's claim presents a single, straightforward question: is Brampton liable for demurrage under Norfolk's tariff? Amended Complaint, ¶ 8.

The courts below were asked to apply the plain terms of the tariff and determine whether Brampton is liable for demurrage accruing after delivery.[13] Norfolk's tariff provides that "Demurrage charges will be assessed against . . . the consignee at destination."[14] The tariff defines "consignee" as "[t]he party to whom a shipment is consigned or the party entitled to receive the shipment."[15] It is undisputed that Brampton: (1) was the party to whom the consignor consigned the shipment by naming Brampton as the consignee, (2) was the party entitled to receive the shipment, (3) actually accepted the shipment, and (4) did not relieve itself of its obligations as the named consignee by providing the advance, specific, written notice required by the federal statutory scheme.[16] Yet, the Eleventh Circuit held that Brampton is not a consignee, rendering the tariff unenforceable.

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[13] Under common law, the tariff became applicable to Brampton when Brampton accepted delivery of the rail cars. Opp., p. 2.

[14] Tariff, Item 850 (5); *Groves*, 586 F.3d at 1276.

[15] Tariff, Item 200 (6).

[16] *Groves*, 586 F.3d at 1276.

When demurrage is assessed under a tariff, it is subject to STB regulation under 49 U.S.C. § 10702.[17] The STB's jurisdiction is exclusive, rather than primary.[18]

Objections to subject matter jurisdiction based upon an argument that the STB's jurisdiction is exclusive can be raised at any point. *Novolog*, 502 F.3d at 253 (citations omitted).

Brampton dedicates six pages of its brief to a discussion of why the doctrine of *primary* jurisdiction cannot prevent the Eleventh Circuit from issuing its ruling in the decision below. Opp., pp. 17-22. Brampton's brief fails to discuss *exclusive* jurisdiction, which the STB possesses because the demurrage at issue accrued under the terms of a tariff (as opposed to a private

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[17] *PCI Transportation, Inc. v. Fort Worth & Western R.R. Co.*, 2008 STB LEXIS 218, STB Docket No. 42094 (Sub-No. 1), *1 (STB served April 25, 2008) ("*PCI STB*"); *and see Capitol Materials, Inc. – Petition for Declaratory Order – Certain Rates and Practices of Norfolk Southern Railway Company*, 2004 STB LEXIS 227, STB Docket No. 42068, *3 (STB served April 12, 2004).

[18] 49 U.S.C. § 10501(b); *Illinois Central R.R. v. South Tec Development Warehouse*, No. 97-C-5720, 1999 U.S. Dist. LEXIS 11222,* 4-7 (N.D. Ill. July 16, 1999) (citation omitted); *and see PCI STB*, 2008 STB LEXIS 218, *7, *10-11 (*citing PCI Transp., Inc. v. Fort Worth & Western R.R. Co.*, 418 F.3d 535 (5th Cir. 2005)).

The STB's jurisdiction is primary, not exclusive, when demurrage charges are assessed under a private contract. *See Novolog*, 502 F.3d at 250, 252-53.

agreement between Norfolk and Brampton). When the Eleventh Circuit rejected the definition of consignee provided in the applicable tariff, and fashioned its own novel definition, that court improperly usurped the exclusive (not primary) jurisdiction of the STB and rendered a judgment beyond its authority.

D. The Eleventh Circuit's Decision Imposes an Unclear and Unworkable Rule Upon the Interstate Rail Network

Brampton claims that the Eleventh Circuit's decision is supported by "99 years" of uniform decisional precedent[19] which was only recently rejected by the

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[19] The cases cited by Brampton are similar in that several of the decisions exculpate parties identified as consignees on bills of lading from demurrage liability. However, the reasoning and fact based (and perhaps result driven) holdings are anything but uniform. In *Southern Pacific Transportation Co. v. Matson*, 383 F.Supp. 154 (N.D. Cal. 1974), the court coined the term "connecting carrier-consignee" in order to spare a party that had been identified as consignee on only "a few" of 72 bills of lading from demurrage liability. *Id.*, at 155, 157. In *South Tec*, the court created the concept of "legal consignee" and noted that the defendant had only been named as consignee on 10% or less of the bills of lading. *Id.*, at 821. In *Union Pacific v. Carry Transit, Inc.*, No. 3:04-CV-1095, U.S. Dist. LEXIS 45568 (N.D. Tex. 2005), the court created the nomenclature "actual consignee." *Id.* at *6. In *Western Maryland Ry. Co. v. South African Marine Corp.*, No. 86-CIV-2059, 1987 U.S. Dist. LEXIS 7323 (S.D.N.Y. Aug. 13, 1987), the court noted that "Whether one named as a consignee in a contract thereby becomes liable for demurrage charges . . . is a question which has spawned disparate case law." *Id.* at *8 (citations omitted). Finally, in *CSX v. City of Pensacola*, 936 F.Supp. 880 (N.D. Fla. 1995), the court (Cont'd)

Third Circuit in *Novolog*. Opp., pp. 3-4. Of course, *Novolog* is the most recent opinion from a Circuit Court of Appeals addressing the issue of "who is a consignee" for purposes of demurrage liability. Prior to the Eleventh Circuit's decision, *Novolog* was also the *only* opinion from a Circuit Court which provided a clear and direct answer to that question.

In its holding, the Third Circuit rejected the reasoning and result reached by the authorities relied upon by the Eleventh Circuit for three reasons: (1) there is no reason to define consignee in any way other than its common and statutory manner, namely, as "the person to whom the bill of lading authorized delivery and who accepts that delivery[;]" (2) the *Novolog* rule establishes clear, easily enforceable rules for demurrage liability; and, (3) it is completely within the consignee's power to avoid liability. *Novolog*, 502 F.3d at 257-259. In *Groves*, the Eleventh Circuit acknowledged these three reasons but failed to discuss them. *Groves*, 586 F.3d at 1280-1281.

(Cont'd)

created the concept of "putative consignee." *Id.*, at 884. This is unfortunate because it needlessly muddied the water on this issue as the defendant in *Pensacola* had *not* been named as consignee on *any* bill of lading. *Id.*

The Eleventh Circuit's decision introduced the titles "named consignee," "ultimate consignee," and "consignee for the purposes of demurrage" to the confusing and growing number of permutations of the once straightforward concept of consignee. *Groves*, 586 F.3d at 1275, 1276, 1280, 1281 ("named consignee"); *and id.* at 1276 ("ultimate consignee"); *and id.* at 1280 ("consignee for the purposes of demurrage").

Setting aside the merits of the conflicting approaches taken by the Third and Eleventh Circuits, Brampton incorrectly argues that the Eleventh Circuit's decision does not represent a change in the law. The Eleventh Circuit's decision rejects the well established definition of consignee set forth in tariffs, statutes, and *Novolog*. The Eleventh Circuit's decision resulted in a major sea change regarding the class of entities that can be a consignee, and introduced a new burden of proof.

Brampton claims that the Eleventh Circuit's ruling synchronizes with historical precedent by requiring rail carriers to "sue the consignee, not someone who has been misidentified as such." Opp., p. 25. This flippant dictate, however, completely ignores the rail carrier's perspective. In this case, for instance, if the party who is identified on the bills of lading as consignee and who accepts the freight is not the "actual consignee," then who is? Brampton could not answer these questions and it is the party contracting with the consignor. Opp., p. 5. So how could the railroad, which is simply in the middle of a transaction between the consignor and the named consignee, determine who is? It cannot, which is why the federal statutory scheme does not place that burden on the railroad. Brampton's claim that this ruling, which conflicts with that statutory scheme, provides rail carriers with a "clear" and "workable" rule to determine who is liable for demurrage is simply wrong. Brampton's self-serving position that anyone but it is the party liable for demurrage provides no direction for rail carriers attempting to deliver rail cars in the Eleventh Circuit and comply with their statutory mandate to collect demurrage. *See* 49 U.S.C. § 10746.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 09-1212

In the Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
PETITIONER

v.

BILLY GROVES, INDIVIDUALLY, DBA SAVANNAH
RE-LOAD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the courts below had subject-matter jurisdiction to grant and affirm summary judgment in favor of respondents in petitioner's suit to recover "demurrage" charges for prolonged possession of its railway cars.

2. Whether a warehouseman becomes liable for railroad demurrage when he is named as consignee on a bill of lading and accepts delivery of goods by rail, even if he is unaware of his designation as consignee.

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In the Supreme Court of the United States

No. 09-1212

NORFOLK SOUTHERN RAILWAY COMPANY, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The terms of a shipment of goods by rail, like the terms of a shipment of goods by any common carrier, have traditionally been set forth in a document known as a "bill of lading." See 49 U.S.C. 11706(a). "A bill of lading records that a carrier has received goods from the party that wishes to ship them, states the terms of carriage, and serves as evidence of the contract of carriage." *Norfolk S. Ry.* v. *James N. Kirby, Pty Ltd.*, 543

U.S. 14, 18-19 (2004). A bill of lading names both a "consignor," who is the originator of the goods, and a "consignee," who is the formally designated entity "to whom or to whose order the bill promises delivery." *Paper Magic Group, Inc.* v. *J.B. Hunt Transp., Inc.*, 318 F.3d 458, 461 (3d Cir. 2003) (quoting U.C.C. § 7-102 (2002)); see also *Black's Law Dictionary* 350 (9th ed. 2009) (defining "consignor" and "consignee"). The bill of lading will sometimes instruct the carrier to deliver directly to the named consignee; other times, it will instruct delivery to someone else, such as another carrier. See, *e.g.*, *Middle Atl. Conference* v. *United States*, 353 F. Supp. 1109, 1117 (D.D.C. 1972) (three-judge panel) (describing "shipments moved by rail to dockside, thence by lighters and barges to the steamships that would ultimately deliver them to their consignees"). When a bill of lading instructs delivery to a middleman such as a "warehouseman"—an entity that temporarily stores goods between legs of a multi-leg shipping journey—that middleman may, or may not, be named as the consignee. Pet. App. 6a.

Longstanding law and practice in the transportation industry permit a carrier to impose charges when its equipment is detained beyond a certain length of time for loading or unloading. See *Middle Atl. Conference*, 353 F. Supp. at 1113-1115. The practice of railroads charging for the overlong detainment of railcars is known as "demurrage." *Id.* at 1113. "All demurrage charges have a double purpose. One is to secure compensation [to the railroad] for the use of the car and of the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention." *ICC* v. *Oregon Pac. Indus.*, 420 U.S. 184, 189-190

(1975) (quoting *Turner, Dennis & Lowry Lumber Co.* v. *Chicago, Milwaukee & St. Paul Ry.*, 271 U.S. 259, 262 (1926)).

The efficiency of railroads and the prevention of undue detention of railcars are matters of national importance. As history has repeatedly demonstrated, a shortage of railcars can seriously impede the flow of commerce. See, *e.g.*, *Oregon Pac. Indus.*, 420 U.S. at 189 ("Car shortages, [a congressional report] found, resulted in short supplies of basic foods in the markets 'with attendant high prices.'") (quoting H.R. Rep. No. 18, 65th Cong., 1st Sess. 1 (1917)); *Investigation of Adequacy of R.R. Freight Car Ownership, Car Utilization, Distribution, Rules and Practices*, 323 I.C.C. 48, 50 (1964) ("Car shortages of varying duration and severity have been with us for decades and in every national emergency. They have occurred each year during periods of peak loadings and in about every producing area of the country."); *Chrysler Corp.* v. *New York Cent. R.R.*, 234 I.C.C. 755, 759-760 (1939) (describing severe railcar shortages between 1906 and 1922).

2. In light of the strong federal interest in efficient railroad operation, the federal government for over a century has exercised "broad powers" to regulate demurrage and other railroad-related matters. *Turner, Dennis & Lowry Lumber Co.*, 271 U.S. at 262; see, *e.g.*, *Iversen* v. *United States*, 63 F. Supp. 1001, 1004 (D.D.C. 1946) (three-judge panel) (discussing regulatory adoption of the Uniform Demurrage Code in 1909). Those powers originally belonged to the Interstate Commerce Commission (ICC), see *ibid.*, but now belong to its successor, the Surface Transportation Board (Board), pur-

suant to the ICC Termination Act of 1995 (Act), Pub. L. No. 104-88, 109 Stat. 803. See 49 U.S.C. 10101 *et seq.*

Under the current statutory framework, as relevant here, the Board "has jurisdiction," subject to certain limited exceptions, "over transportation by rail carrier that is" either "only by railroad" or "by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment." 49 U.S.C. 10501(a); see note 2, *infra*. Rail carriers subject to the Board's jurisdiction must maintain their availability to provide carriage "on reasonable request" by anyone. 49 U.S.C. 11101(a). Such railroads are furthermore obligated to "establish reasonable * * * rates, * * * rules, and practices" for the carriage services they offer. 49 U.S.C. 10702.

With respect to demurrage, railroads subject to Board jurisdiction must "compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to * * * (1) freight car use and distribution; and (2) maintenance of an adequate supply of freight cars to be available for transportation of property." 49 U.S.C. 10746. Railroads commonly comply with this requirement by publishing a tariff (*i.e.*, a set of rates for services) that sets the terms for demurrage, along with other charges. See, *e.g.*, Pet. 9 (reproducing relevant provisions of the tariff at issue in this case). The Board is empowered to hold adjudications to determine whether a regulated railroad's demurrage rates and practices (as well as other rates and practices) are reasonable. 49 U.S.C. 10702, 10704(a)(1), 10746, 11701(a). If a particular rate or practice is found to be unreasonable, the Board "may order the carrier to stop" it, and also "may prescribe the maxi-

mum rate, classification, rule, or practice to be followed." 49 U.S.C. 10704(a)(1). The Board additionally has general authority to promulgate regulations governing rail practices. 49 U.S.C. 721(a).

The Board's authority, like the ICC's before it, extends to determining the classes of entities against which demurrage charges may be imposed. 49 U.S.C. 10702, 10746. In the analogous context of "detention" charges for trucking, for example, the ICC previously held a tariff to be unreasonable if it imposes liability on intermediaries who are "not beneficial owners of the freight, who are not named as consignors or consignees in the bills of lading, and who are not otherwise party to the contract of transportation." *Responsibility for Payment of Det. Charges, E. Cent. States*, 335 I.C.C. 537, 541 (1969) (emphasis omitted) (*Eastern Central*), aff'd, *Middle Atl. Conference, supra.* An adjudicatory petition, filed in 2008, is currently pending before the Board that raises the related question of whether a warehouseman may be held liable for demurrage when it is named as a consignee in a bill of lading without its consent. *Springfield Terminal Ry.—Petition for a Declaratory Order*, NOR 42108. And, as discussed more fully below, the Board has recently initiated a rulemaking proceeding that will address demurrage issues more generally, including the assessment of demurrage against warehousemen who have been designated as consignees without their consent or without their knowledge. See generally App., *infra.*

3. a. This case involves demurrage charged by petitioner, a railroad that engages in activities subject to regulation by the Board, against respondents, who operate a warehousing business in Savannah, Georgia. Pet. App. 2a, 5a; Pet. 13, 18. Beginning in late 2006, a freight

forwarding company, Galaxy Forwarding, arranged on numerous occasions for goods to be shipped from domestic shippers to Savannah for export by sea. Pet. App. 3a. Pursuant to bills of lading received from Galaxy, petitioner would deliver goods to respondents. *Ibid.* Respondents would unload the freight, reload it into shipping containers, and, based on instructions from Galaxy, send the freight along to nearby ports for overseas transportation. *Id.* at 2a-3a, 25a. Although respondents never took any ownership interest in the freight, and were never the final destination for the goods, some of the bills of lading (though not all of them) named respondents' warehousing business as the consignee of the goods. *Id.* at 6a, 25a.

Respondents did not participate in arranging these bills of lading, and the record indicates that respondents were not provided with advance copies. Pet. App. 3a, 6a. Instead, respondents would receive unilateral notice from Galaxy about impending deliveries, accompanied by instructions for exporting the goods. *Id.* at 3a, 25a. Petitioner would notify respondents when railcars were ready for delivery, and would coordinate the delivery of full railcars, and the removal of empty ones, from respondents' facility. *Id.* at 4a.

In March 2007, Galaxy began sending rail freight to respondents at such a volume that demurrage accrued. Pet. App. 4a. Petitioner's tariff provided that petitioner could assess demurrage "against * * * the consignee at destination who will be responsible for payment." Pet. 9; see *ibid.* (tariff defined "[c]onsignee" as "[t]he party to whom a shipment is consigned or the party entitled to receive the shipment"). Petitioner presented respondents with a bill for demurrage. Pet. App. 7a. Respondents refused to pay. *Ibid.*

b. Petitioner filed suit against respondents in the Southern District of Georgia. Pet. App. 24a. As amended, its complaint sought demurrage for those shipments on which respondents' business was named as the consignee on the bill of lading. *Id.* at 7a. The district court granted respondents' motion for summary judgment on the ground that respondents could not be held liable for demurrage on shipments when the bills of lading had named their business as a consignee without their knowledge or consent. *Id.* at 7a-8a, 27a-34a. The district court determined that respondents had submitted unrebutted evidence that they were never notified, either by petitioner or by Galaxy, until after demurrage charges had already accrued that the bills of lading named their business as the consignee of the freight. *Id.* at 27a.

The court of appeals affirmed. Pet. App. 21a. The court observed that "[t]he parties agree that an entity must be a party to the transportation contract to be liable for demurrage charges, that a consignee becomes a party to the transportation contract upon accepting the freight consigned to it, and that a consignee" who is merely acting as an agent for the beneficial owner of the freight "may avoid demurrage liability by disclosing its agency status [to the railroad] prior to accepting delivery of the shipment" pursuant to a procedure set forth in 49 U.S.C. 10743(a)(1). Pet. App. 13a; see 49 U.S.C. 10743(a)(1) (providing that, upon proper notice to a carrier, "a consignee that is an agent only" may avoid certain types of charges). "[T]he key question," the court stated, was "whether [respondents' business] was a consignee in the context of this case." Pet. App. 13a.

The court of appeals perceived a "conflict of authority" on that issue between the Seventh and Third Circuits. Pet. App. 14a. The Seventh Circuit had held that

"being listed by third parties as a consignee on some bills of lading is not alone enough to make [a warehouseman] a legal consignee liable for demurrage charges." *Ibid.* (quoting *Illinois Cent. R.R.* v. *South Tec Dev. Warehouse, Inc.*, 337 F.3d 813, 821 (7th Cir. 2003)). The Third Circuit had held that "an entity named on a bill of lading as the sole consignee, without any designations clearly indicating any other role, is presumptively liable for demurrage fees on the shipment to which that bill of lading refers." *Id.* at 15a (quoting *CSX Transp. Co.* v. *Novolog Bucks County*, 502 F.3d 247, 262 (3d Cir. 2007), cert. denied, 552 U.S. 1183 (2008)). The Third Circuit had reasoned that this was the easiest rule to administer, that a consignee becomes a party to a transportation contract by accepting delivery of the freight, and that agent-consignees could avoid unwanted liability by providing notice of their agency status to the railroad under 49 U.S.C. 10743(a)(1). *CSX Transp. Co.*, 502 F.3d at 254-259.

The court of appeals in this case held that the Third Circuit's rule "cannot function in a situation where the receiver of freight is not given notice that it has been listed as a consignee by third parties." Pet. App. 17a. In order to be liable for demurrage, the court stated, "a party must assent to being named as a consignee on the bill of lading * * *, or at the least, be given notice that it is being named as a consignee in order that it might object or act accordingly." *Id.* at 19a. The court reasoned that consignee status is at least quasi-contractual, and that contract principles do not permit an entity to be designated as a consignee without its knowledge or agreement. *Id.* at 18a.

4. On December 6, 2010, the Board issued an Advance Notice of Proposed Rulemaking announcing its

intent "to adopt a rule or policy statement addressing when parties should be responsible for demurrage in light of current commercial practices followed by rail carriers, shippers and receivers." App., *infra*, 1a. One of the demurrage issues that the Board intends to address in particular is "the law when a warehouseman who accepts rail cars and holds them too long is named as consignee in the bill of lading, but asserts that it did not know of its consignee status or that it affirmatively asked the shipper not to name it consignee." *Id.* at 6a (emphasis omitted).

The Board's attention became focused on broader demurrage issues due to the potentially divergent approaches of the Third Circuit and the court of appeals in this case. App., *infra*, 3a. In the Board's view, "the best answer in this matter is not readily apparent," "there are shortcomings" in both courts' approaches, and resolution of the issue would benefit from "broad public input." *Id.* at 7a.

One of the primary reasons why the Board believes that public input, and a rulemaking proceeding more generally, would be useful is that the legal framework governing demurrage developed at a time when industry practices were different than they are now. App., *infra*, 2a-8a. Bills of lading, for example, are now handled electronically, rather than on paper, and industry practice involving consignee designation "is evolving." *Id.* at 8a. The Board is accordingly requesting comment from industry participants and others regarding industry practices and the impact various alternative demurrage rules might have. *Id.* at 10a-12a.

DISCUSSION

The Court should deny certiorari and allow the Board to apply its expertise to resolve the issue of de-

murrage liability for warehousemen, as well as other related demurrage issues, through its pending rulemaking proceedings. The current legal uncertainty about the liability of warehousemen for demurrage arises in the context of considerable factual uncertainty about current industry practices. The Board has proposed to proceed by rulemaking, rather than agency adjudication, in order to obtain more information about those practices and the ways in which the imposition of demurrage liability on various types of entities would affect rail transportation overall.

A rulemaking proceeding has advantages not only over agency adjudication, but judicial adjudication as well. Rulemaking provides the Board with greater fact-finding capability than a court, and permits the agency to craft prospective, context-specific solutions to practical problems, as well as to dispense with potentially outdated agency precedent. These sorts of inherent agency advantages often lead courts, under the doctrine of "primary jurisdiction," to refer the initial resolution of highly technical matters to agencies with special industry expertise. A similar rationale counsels in favor of denying certiorari here, and allowing the issue of warehouseman demurrage to be resolved in the first instance by the Board, rather than by this Court on review of a limited summary-judgment record.

1. As an initial matter, petitioner suggests (Pet. 26-30) that this Court should grant certiorari to consider whether the court of appeals "infringed upon the exclusive jurisdiction of the [Board] and rendered a judgment beyond its power" in deciding whether respondents could be held liable for demurrage. That suggestion lacks merit.

Petitioner, which has invoked the federal courts' jurisdiction as both the plaintiff and the appellant in this case, never argued to the court of appeals (even in its rehearing petition) that the federal courts lack authority to decide whether respondents may, as a matter of law, be held liable for demurrage. Nor did the court of appeals address that threshold issue. This Court does not ordinarily consider issues that were neither pressed nor passed upon below, see, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993), and there is no reason to deviate from that practice here. Although a litigant (or the court itself) may question subject-matter jurisdiction at any stage of the proceedings, "even initially at the highest appellate instance," *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004), this Court has no obligation to grant certiorari whenever a petitioner asserts for the first time that a lower court exceeded its jurisdiction.

Even if the jurisdictional issue had been properly presented below, it still would not warrant certiorari. The Act expressly contemplates that a rail carrier may file "a civil action to recover charges for transportation or service provided by the carrier." 49 U.S.C. 11705(a). Petitioner contends that courts are nonetheless deprived of subject-matter jurisdiction over certain rail-charge-related matters by 49 U.S.C. 10501(b), which provides:

> The jurisdiction of the Board over * * * transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers * * * is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail

transportation are exclusive and preempt the remedies provided under Federal or State law.

The First Circuit has held that Section 10501(b) is a preemption provision that displaces remedies under state law (or other federal law) as a substantive matter, not a provision that strips federal courts of subject-matter jurisdiction. See *Pejepscot Indus. Park, Inc.* v. *Maine Cent. R.R.*, 215 F.3d 195, 200-205 (2000). Petitioner fails to identify any court of appeals that has adopted petitioner's contrary view of the statute.[1] The issue therefore does not independently warrant certiorari, though if the Court were to grant review on the substantive question of demurrage liability, it would be appropriate to grant review on this threshold question as well.

2. a. The Court should, however, deny certiorari on both questions, in light of the pending proceedings before the Board. The Board is "the expert body Congress has designated to weigh the many factors at issue when assessing whether a rate is just and reasonable." *BNSF Ry.* v. *Surface Transp. Bd.*, 526 F.3d 770, 774 (D.C. Cir. 2008). The principles animating the doctrine of primary jurisdiction strongly favor allowing the Board to estab-

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[1] Moreover, it is not clear what the scope of petitioner's position regarding subject-matter jurisdiction is, or that petitioner's articulation of its position actually covers this case. Petitioner contends that "[t]o the extent" that "questions are raised regarding the enforceability or reasonableness of the terms of any rail carrier's tariff," those questions fall within the Board's exclusive jurisdiction. Pet. 28. The court of appeals did not expressly hold petitioner's tariff to be unreasonable or unenforceable. The court concluded that both the Act and petitioner's tariff provided for assessment of demurrage against a "consignee," see Pet. App. 5a-6a, 11a-13a, but held that respondents' business was not a consignee, *id.* at 14a-21a.

lish a default rule (or rules), in the first instance, for demurrage liability.[2]

The primary-jurisdiction doctrine "comes into play whenever enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 64 (1956). "[I]n such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *Ibid.*

Although the decision whether to grant certiorari in this case does not literally present a question of primary jurisdiction—because the Court is not deciding whether to suspend and refer a proceeding, but instead whether to exercise discretionary review over a proceeding that overlaps with a proposed rulemaking—the considerations are similar. Cf. *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (observing that this Court is "not the sole body that could eliminate [circuit] conflicts, at least as far as their continuation into the future is concerned," and factoring the pendency of proceedings be-

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[2] Such a rule could apply to all rail transportation within the Board's jurisdiction. The Board has statutory authority, which it has exercised in the past, to exempt certain rail services from some or all of the otherwise applicable statutory provisions. See 49 U.S.C. 10502(a). Under that provision, however, the Board could decide not to exempt any rail carriers from demurrage rules it promulgates. See, *e.g.*, 49 C.F.R. 1039.14 (transportation in boxcars exempted from many regulatory provisions, but not all). Moreover, for services that already have been exempted, the Board has authority to revoke exemptions. See 49 U.S.C. 10502(d). Rail carriers additionally may enter into private contracts with their customers that are beyond the Board's jurisdiction. See 49 U.S.C. 10709. To the extent, if any, that the existence of such contracts might affect the imposition of demurrage, the Board will be able to assess and consider that factor in its rulemaking proceeding.

fore the United States Sentencing Commission into its determination not to address a particular issue). In particular, as this Court has recognized, "[u]niformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." *Far E. Conference* v. *United States*, 342 U.S. 570, 574-575 (1952).

b. Determining whether, or when, warehousemen should be liable for railroad demurrage is precisely the type of question upon which the Board's "specialization," its "insight gained through experience," and its "more flexible procedure" can all usefully be brought to bear. See *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 304 (1976) ("The doctrine [of primary jurisdiction] has been applied, for example, when an action otherwise within the jurisdiction of the court raises a question of the validity of a rate or practice included in a tariff filed with an agency, particularly when the issue involves technical questions of fact uniquely within the expertise and experience of an agency—such as matters turning on an assessment of industry conditions.") (citations omitted). The Board (both now and when it was the ICC) has longstanding legal and practical expertise in demurrage matters. See pp. 3-5, *supra*; App., *infra*, 3a & n.2 (citing cases). Such expertise, extending beyond the record developed in a particular case in court, is highly relevant to consideration of the question presented here. To take but one example of a relevant fact-based disagreement between the parties, respondents contend that ware-

housemen are "already incentivized," even in the absence of demurrage liability, "to return empty rail cars as quickly as possible." Br. in Opp. 16. Petitioner responds that "[t]his argument ignores the realities of the marketplace." Reply Br. 7. The Board, with its extensive experience, and ability to gather information about the industry as a whole, is in a better position to resolve that factual dispute (particularly in a rulemaking proceeding) than a court (particularly in a summary-judgment posture) would be.

Significantly, despite its specialized industry knowledge, even the Board itself does not feel well-enough informed, at present, to establish a comprehensive demurrage policy,[3] and has accordingly requested public comment on a variety of factual matters. App., *infra*, 10a-12a. One of those matters concerns the precise factual dispute just mentioned: whether there is "benefit to the warehouseman from holding rail cars." *Id.* at 12a. Other factual issues on which the Board seeks public comment include "how the paperwork attending a shipment of property by rail is processed"; how that paperwork "gives (or does not give) all affected parties (rail carriers, shippers, consignee-owners, warehousemen etc.) notice of the status that they are assigned in the bill of lading"; whether "actual placement of freight cars on the track of the shipper or receiver constitute[s] adequate notification to a shipper, consignee or agent that a demurrage liability is being incurred"; whether such

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[3] As noted above, a declaratory-order proceeding has been pending before the Board raising the question whether a party may be held liable for demurrage charges when it is named as a consignee in a bill of lading without its consent. See *Springfield Terminal Ry.*, discussed at p. 5, *supra*. That proceeding is still ongoing; the Board issued its latest order in the case on June 11, 2010.

an entity receives adequate notification in the case of a "constructive placement" (in which cars are temporarily placed elsewhere when the shipper's or receiver's own track is unavailable); and how certain applications of the rule adopted by the court of appeals in this case would "affect industry practice." *Id.* at 10a-12a. A court is not in an optimal position to engage in such a broad inquiry involving numerous interested parties, and, even if it were, it would lack the relevant expertise to discern which submissions, among potentially contradictory ones, have the greatest force.

c. Even assuming that a court were able to get an accurate picture of industry practices, it would lack the flexibility that the agency enjoys to craft a legal regime to address any problems that may exist. As far as the Board is concerned, the issue of demurrage liability for warehousemen does not, and should not, simply involve a binary choice between legal rules adopted by different courts of appeals. Indeed, the Board has expressed skepticism about each of the rules adopted by the circuits. The Board has observed that the Third Circuit's rule, which "places dispositive weight on the designation given to the warehouseman in the bill of lading," may not be consistent with modern (electronic) bill-of-lading practices. App., *infra*, 7a. On the other hand, the decision below, the Board has noted, "overlooks the fact that" imposition of demurrage liability on a warehouseman might be the best way to encourage efficient use of freight cars, "because the warehouseman is in the best position to deal with returning the equipment or rejecting cars if its facility is overcrowded." *Id.* at 8a.

For example, one potential solution that would be beyond a court's power to adopt, but could be implemented by the Board, would be to adopt revised bill-of-

lading practices to assure that "all affected parties (rail carriers, shippers, consignee-owners, warehousemen etc.)" receive timely notice of each bill of lading that pertains to them, and to require that bills of lading "accurately reflect the de facto status of each party in relation to other parties involved with the transaction." App., *infra*, 10a-11a. Such requirements could avoid situations, like in this case, in which a railroad believes that a warehouseman is a consignee, but the warehouseman believes himself to be a non-consignee intermediary.

Another respect in which the Board has more flexibility than a court is in its ability to reconsider old regulatory precedent. The Board has stated, for example, that it is open to reconsidering the ICC's decision in *Eastern Central* that interpreted the predecessor of 49 U.S.C. 10743(b)—which permits a consignee that is merely an agent for someone else to avoid liability for certain charges if it informs the railroad of its agency status—to apply to demurrage charges. App., *infra*, 8a-9a. The ICC order in *Eastern Central* was affirmed by the three-judge district court in *Middle Atlantic Conference*, *supra*, (see p. 5, *supra*), which decision was in turn addressed both by the court of appeals in this case and by the Third Circuit in *CSX Transportation Co.* See Pet. App. 9a-10a, 12a, 16a; 502 F.3d at 258 n.11, 261-262. A court would generally be required to defer to the existing agency interpretation. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984). The Board, however, may "consider varying interpretations and the wisdom of its policy on a continuing basis." *National Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (*Brand X*) (quoting *Chevron*, 476 U.S. at 863-864); see *American Trucking Ass'ns* v. *Atchison*,

Topeka & Santa Fe Ry., 387 U.S. 397, 416 (1967) ("[F]lexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency."). It therefore has the discretion to adopt a new interpretation of this (or another) statute, in which event that new interpretation would be entitled to judicial deference. *Brand X*, 545 U.S. at 981. By doing so, the agency can alter the legal landscape in ways that a court cannot.

This is not to say that courts have no role to play in the regulation of demurrage. A rule promulgated by the Board would be subject to judicial review in the court of appeals (and then, possibly, in this Court). See 28 U.S.C. 2321(a), 2342(5), 2344; see also 28 U.S.C. 1254(1). There accordingly is no concern that proceedings before the Board would result in any procedural unfairness, or in a rule that exceeded the Board's legal authority. In reviewing a rule promulgated by the Board, a court would have the benefit of the record compiled by the Board as well as the application of the Board's expertise to that record—advantages that are absent from this case in its current posture.

3. The decision below does not create immediate practical problems of a magnitude that warrants granting certiorari now, notwithstanding the pending proceedings before the Board. Litigation on the question presented has been relatively sparse. See App., *infra*, 5a-6a. The decision below was rendered over a year ago, and the Board is not aware of major problems that have arisen during the intervening period. There is no reason to think that such problems will arise while the Board proceedings are pending. If they did, however, they could perhaps be mitigated by petitioner and other carriers through modifications of their notification pro-

cedures, and the Board would additionally be in position to handle them through adjudications and (if necessary) emergency rulemaking.

Furthermore, the Board intends to act quickly on this matter. See App., *infra*, 1a (closing comment period on Advance Notice of Proposed Rulemaking on February 23, 2011). To the extent that the Board proceedings may take somewhat longer than a decision by this Court would, the benefits of permitting a regulatory solution far outweigh the minimal burden of a modest delay in awaiting that solution.

That is true not only for reasons already discussed, but also because further review in the present case would not resolve all outstanding issues relating to demurrage. There are a number of variations in the circumstances under which a railroad might attempt to impose demurrage liability, not all of which are encompassed within the question presented in this case. For example, the Board's request for comments highlights the possibility that there may be cases in which a "warehouseman or other receiver * * * reap[s] financial gain" by holding on to railcars and using them for excess storage capacity. App., *infra*, 12a. If that were to occur, it might be proper to impose demurrage liability on an unjust enrichment theory, even if in other circumstances demurrage liability for a warehouseman might be inappropriate. See *ibid.*

Because of that potential issue, as well as others, the Board may well need to proceed with its rulemaking even if certiorari is granted. And the results of that rulemaking could potentially supersede the Court's decision, at least in certain respects. See, *e.g.*, *Brand X*, 545 U.S. at 982-985; pp. 17-18, *supra*. For that reason, in

addition to the reasons previously explained, further review in this case is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2010

APPENDIX

41269 SERVICE DATE—DECEMBER 6, 2010
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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 707

DEMURRAGE LIABILITY

Decided: December 3, 2010

AGENCY: Surface Transportation Board (Board or STB).

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: Through this Advance Notice of Proposed Rulemaking (ANPR), the Board is instituting a proceeding regarding demurrage, *i.e.*, charges for holding rail cars. The agency's intent is to adopt a rule or policy statement addressing when parties should be responsible for demurrage in light of current commercial practices followed by rail carriers, shippers, and receivers.

DATES: Comments are due by January 24, 2011. Reply comments are due by February 23, 2011.

ADDRESSES: Comments and replies may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board's website, at http://www.stb.dot.gov. Any person submitting a fil-

ing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: STB Ex Parte No. 707, 395 E Street, S.W., Washington, DC 20423-0001. Copies of written comments and replies will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's website.

FOR FURTHER INFORMATION CONTACT: Craig Keats at 202-245-0260. (Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.)

SUPPLEMENTARY INFORMATION: Demurrage—the assessment of charges for holding railroad-owned rail freight cars for loading or unloading beyond a specified amount of time—has compensatory and penalty functions. It compensates car owners for the use of their equipment, and by penalizing those who hold cars too long, it encourages prompt return of rail cars into the transportation network. Because of these dual roles, demurrage is statutorily recognized as an important tool in ensuring the smooth functioning of the rail system.

Since the earliest days of railroad regulation, there have been disputes about who should be responsible for paying demurrage. Certain principles for allocating liability for holding carrier equipment became well established over time and were reflected in agency and

court decisions.[1] Regulatory and technological changes over the years, however—such as the elimination of required tariff-filing and the advances in electronic commerce—suggest a need to revisit the matter to consider whether the Board's policies should be revised to account for current statutory provisions and commercial practices.

The Board has long been involved in resolving demurrage disputes, both as an original matter and on referral from courts hearing railroad complaints seeking recovery of charges.[2] Our attention became focused on the possible need to examine our policies, however, when some tension developed in the federal courts of appeals regarding the liability of warehousemen and similar third-party car receivers for railroad demurrage.[3] As

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[1] See *Responsibility for Payment of Detention Charges, Eastern Cent. States*, 335 I.C.C. 537, 541 (1969) (*Eastern Central*) (involving liability of intermediaries for detention, the motor carrier equivalent of demurrage), *aff'd, Middle Atl. Conference v. United States*, 353 F. Supp. 1109, 1114-15 (D.D.C. 1972) (3-judge court sitting under the then-effective provisions of 28 U.S.C. § 2321 et seq.) (*Middle Atlantic*).

[2] *E.g., Eastern Central*; *Springfield Terminal Ry.—Petition for Declaratory Order*, NOR 42108 (STB served June 16, 2010); *Capitol Materials Inc.—Petition for Declaratory Order—Certain Rates and Practices of Norfolk S. Ry.*, NOR 42068 (STB served Apr. 12, 2004); *R. Franklin Unger, Trustee of the Indiana Hi-Rail Corp., Debtor—Petition for Declaratory Order—Assessment and Collection of Demurrage and Switching Charges*, NOR 42030 (STB served June 14, 2000); *South-Tec Dev. Warehouse, Inc., and R.R. Donnelley & Sons Company—Petition for Declaratory Order—Illinois Cent. R.R.*, NOR 42050 (STB served Nov. 15, 2000); *Ametek, Inc.—Petition for Declaratory Order*, NOR 40663, *et al.* (ICC served Jan. 29, 1993), *aff'd, Union Pac. R.R. v. Ametek, Inc.*, 104 F.3d 558 (3d Cir. 1997).

[3] *Compare Norfolk S. Ry. v. Groves*, 586 F.3d 1273 (11th Cir. 2009) (*Groves*), *pet. for cert. pending*, No. 08-15418 (filed Apr. 6, 2010), *with*

we reviewed the two lines of analysis, we began to consider the possibility that neither court's approach produces an optimal outcome given the current statutory and commercial environment. We therefore are instituting this proceeding in an effort to update our policies regarding responsibility for demurrage liability and to promote uniformity in the area.

The Interstate Commerce Act (IC Act), as amended by the ICC Termination Act of 1995 (ICCTA), provides that demurrage is subject to Board regulation under 49 U.S.C. § 10702, which requires railroads to establish reasonable rates and transportation-related rules and practices, and under 49 U.S.C. § 10746, which requires railroads to compute demurrage and to establish demurrage-related rules "in a way that fulfills the national needs related to" freight car use and distribution and that will promote an adequate car supply. In the simplest case, demurrage is assessed on the "consignor" (the shipper of the goods) for delays at origin and on the "consignee" (the receiver of the goods) for delays at destination.

An important issue has always been who is liable for demurrage when goods are shipped to warehousemen, transloaders, or other "intermediate" stops in the transportation chain before reaching their ultimate destination. Notwithstanding the usual common-law liability (for both freight charges and demurrage) of a consignee that accepted delivery,[4] the issue was more complicated

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CSX Transp. Co. v. Novolog Bucks Cnty., 502 F.3d 247 (3d Cir. 2007) (*Novolog*).

[4] *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Fink*, 250 U.S. 577, 581 (1919); *Groves*, 586 F.3d at 1278.

for warehousemen, who typically are not "owners" of the property being shipped. The law became well accepted that, for a warehouseman to be subject to demurrage or detention charges, there had to be some other basis for liability outside the mere fact of handling the goods shipped.[5] And what became the most important "other basis" was whether the warehouseman was shown as the consignee on the bill of lading.[6] Thus, our predecessor, the Interstate Commerce Commission (ICC), held that a tariff[7] may not lawfully assess such charges on a warehouseman who is not the beneficial owner of the freight, who is not named as a consignor or consignee in the bill of lading, and who is not otherwise party to the contract of transportation, "e.g., a warehouseman who receives the freight pursuant to an 'in care of' designation."[8]

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[5] *See, e.g., Smokeless Fuel Co. v. Norfolk & W. Ry.*, 85 I.C.C. 395, 401 (1923).

[6] A bill of lading is the basic transportation contract between the shipper and the carrier; its terms and conditions bind the shipper, the originating carrier, and all connecting carriers.

[7] Historically, carriers gave public notice of their rates and general service terms in tariffs that were publicly filed with the ICC and that had the force of law under the so-called "filed rate doctrine." *See Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 127 (1990). The requirement that rail carriers file rate tariffs at the agency was repealed in ICTA.

[8] *Eastern Central*, 335 I.C.C. at 541. The "in care of" designation refers to the principle of agency law under which a consignee—although presumed to be an owner generally liable for freight charges upon acceptance of goods—could be relieved of such liability if the carrier were made aware that the receiver of the goods was accepting the goods only as an agent for the actual owner. The *Novolog* court, 502 F.3d at 255, found that agency principles such as these became incorporated into the IC Act in the 1920s in what is now 49 U.S.C. § 10743(a). See *Novolog*, 502 F.3d at 255. That statutory provision states that a consignee

The absence of any litigation over the matter suggests that the accepted rule described above provided some degree of certainty for several decades. In recent years, however, a new issue has arisen: what is the law when a warehouseman who accepts rail cars and holds them too long *is* named as consignee in the bill of lading, but asserts either that it did not know of its consignee status or that it affirmatively asked the shipper not to name it consignee? On that issue, the Eleventh Circuit in *Groves* looked to contract principles and found that a party shown as a consignee in the bill of lading is not in fact a consignee unless it expressly agreed to the terms of the bill describing it as a consignee.[9] On virtually identical facts, the Third Circuit in *Novolog* held that "recipients of freight who are named as consignees on bills of lading are subject to liability for demurrage charges arising after they accept delivery unless they act as agents of another [party] and comply with the notification procedures in [the] consignee-agent liability provision [of] 49 U.S.C. § 10743(a)(1)."[10] That provision

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that informs the railroad in writing that it is only an agent is not liable for "additional rates that may be found due after delivery."

[9] Relying in part on *Illinois Cent. R.R. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813 (7th Cir. 2003) (*South Tec*), which did not directly decide the issue but that indicated a predilection toward such a result, *Groves* found the warehouseman not to be a consignee and thus not liable for demurrage even though the warehouse accepted the freight cars as part of its business and held them beyond the period of free time.

[10] 502 F.3d at 254. *Novolog* cited *Middle Atlantic*, the Uniform Commercial Code, and the Federal Bills of Lading Act to find (502 F.3d at 258) that a warehouseman (or, in that case, a transloader) could be a "legal consignee" even if it was not the "ultimate consignee." The court found that a contrary result, such as the one suggested in *South Tec*, would frustrate what it viewed as the plain intent of § 10743: "to facili-

relieves certain receivers of property from liability for certain rates if it notifies the carrier in writing that it is not the owner of the property, but rather is only an agent for the owner.

Discussion

We believe that broad public input would assist us in addressing the liability of a warehouseman who accepts rail cars and holds them too long, but who asserts either that it did not know that it had been designated the consignee on the bill of lading or that it affirmatively asked the shipper not to name it consignee. Indeed, even with the extensive discussions in *Novolog* and *Groves*, the best answer in this matter is not readily apparent. *Novolog* relies on a broad reading of § 10743(a)(1) (one that the ICC appeared to share), along with policy reasons why a rule requiring that a warehouseman explicitly accept potential demurrage liability would not be a good idea. *Groves* relies on contract law principles to support its view that a receiver of goods must explicitly agree before it can be a consignee subject to liability. But neither approach seems clearly superior, and indeed there are shortcomings with each.

Novolog, for example, cites valid transportation reasons for putting liability on the party best able to release the rail cars (the warehouseman) or to decline the

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tate the effective assessment of charges by establishing clear rules for liability" by permitting railroads to rely on bills of lading and "avoid wasteful attempts to recover [charges] from the wrong parties." 502 F.3d at 258-59. The court found warehouseman liability equitable because the warehouseman—which otherwise has no incentive to agree to liability—can avoid liability under § 10743(a) simply by identifying itself as an agent, whereas the rail carrier has no option but to deliver to the named consignee. *Id.* at 259.

cars if it knows that its facility is already overcrowded. Yet *Novolog* places dispositive weight on the designation given to the warehouseman in the bill of lading, which historically was a paper document that was consciously agreed upon by the carrier and the shipper (although it did not require any action by the consignee). Today, however, transactional paperwork such as the bill of lading is largely handled electronically, and the role of the railroad, the shipper, and the listed consignee in making the designation is evolving. In *Groves*, for example, it is unexplained why some of the bills named the warehouseman as the consignee while others did not.

Groves, for its part, is unsatisfying in various ways. First, it overlooks the fact that, because the warehouseman is in the best position to deal with returning the equipment or rejecting cars if its facility is overcrowded, finding the warehouseman to be responsible for demurrage would best advance the intent of 49 U.S.C. § 10746 (efficient use of freight cars). Moreover, although we share the concern that a party might be made liable for charges without its knowledge,[11] as the decision in *Novolog* points out, it is also true that the warehouseman is the one who has the relationship with the shipper, and it should not be the carrier's responsibility to investigate whether the relationship described in the bill of lading accurately reflects the de facto status of the parties.

Finally, notwithstanding the ICC's finding in Eastern Central in 1969, we are not certain that the provisions of 49 U.S.C. § 10743 should be interpreted to apply

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[11] *See West Point Relocation, Inc. & Eli Cohen—Petition for Declaratory Order*, FD 35290 (STB served Oct. 29, 2010).

to demurrage. The language of § 10743 ("[l]iability for rates for transportation") can be read to focus on the shipping charges themselves, and not on accessorial charges such as demurrage. As explained in Hub City and Hall,[12] the statutory provision, which was first enacted in the Transportation Act of 1920 as an anti-discrimination provision, was modified in 1927 to address the liability of a sales agent for freight charges that turned out to be higher than those originally paid. It was further modified in 1940 to address the liability of an agent vis a vis a beneficial owner for additional freight charges resulting when shipments were reconsigned and refused at destination. Neither event speaks to application of the provision to demurrage. Moreover, because § 10743(b) does not apply to a shipment that is prepaid, applying § 10743 to demurrage as well as line-haul charges could have the curious effect of making the consignee liable for demurrage if the shipment is not prepaid, but not liable for the same conduct—holding the cars too long—if it is prepaid. That would be in some tension with the historic (and statutory, see 49 U.S.C. § 10746) purposes of demurrage: to compensate the equipment owner and to facilitate prompt return of cars.

For all of these reasons, we are instituting this proceeding to explore whether we should look to a new way of determining the liability of warehousemen for demurrage.

One possible rule would place liability for demurrage on the receiver of the rail cars, regardless of the desig-

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[12] *Blanchette v. Hub City Terminals, Inc.*, 683 F.2d 1008 (7th Cir. 1981); *Union Pac. R.R. v. Hall Lumber Sales, Inc.*, 419 F.2d 1009 (7th Cir. 1969).

nations in the bill of lading, if the carrier has provided the receiver with adequate notice of liability. (If the receiver were an agent of another party, we assume that the usual principal-agent rules would govern, although we request comments on this point.) What constitutes "adequate notice" could be decided on a case-by- case basis either by the Board or the federal courts in collection actions, or it could be established by rule. Given the potential industry-wide implications of such rules, broad public input is warranted.

Accordingly, we seek comment on these matters. In their comments, parties may address any relevant matters, but we specifically seek comment on the following, which we believe will assist us in developing an appropriate way of allocating liability that advances the purposes of demurrage and also is consistent with the IC Act, contract law, agency law, and principles of notice/fairness:

- Describe the circumstances under which intermediaries ought to be found liable for demurrage in light of the dual purposes of demurrage. Notwithstanding the ICC's decision in Eastern Central, is there a reason why we should not presume that a party that accepts freight cars ought to be the one that is liable regardless of its designation on the bill of lading, so long as it has notice of its liability before it accepts cars?

- Explain how the paperwork attending a shipment of property by rail is processed and how it gives (or does not give) all affected parties (rail carriers, shippers, consignee-owners, warehousemen etc.) notice of the status they are assigned in the bill of lading.

For purposes of assessing demurrage, should it be a requirement that electronic bills of lading accurately reflect the de facto status of each party in relation to other parties involved with the transaction? If so, and if electronic bills of lading do not accurately reflect the de facto status of each party in relation to other parties involved with the transaction, please suggest changes that will ensure that they do.

- With the repeal of the requirement that carriers file publicly available tariffs, how can a warehouseman or similar non-owner receiver best be made aware of its status vis a vis demurrage liability? Does actual placement of a freight car on the track of the shipper or receiver constitute adequate notification to a shipper, consignee or agent that a demurrage liability is being incurred? What about constructive placement (placement at an alternative point when the designated placement point is not available)?

- Describe how agency principles ought to apply to demurrage. Are warehousemen generally agents or non-agents, or are their circumstances too varied to permit generalizations? How can a rail carrier know whether a warehouseman or similar non-owner receiver of freight is acting as an agent or in some other capacity?

- Given the discussions in Hub City and Hall, should § 10743 be read as applicable to demurrage charges at all? The ICC said it was in Eastern Central, but it did so with little discussion. Would general agency principles apply to demurrage liability even if § 10743 were found inapplicable?

- If § 10743 is applicable, would the *Groves* analysis (finding that liability does not attach unless the receiver agrees to accept liability) apply to the underlying shipping rate as well as demurrage charges? If it did, how would such a ruling affect industry practice?

- Because the warehouseman or other receiver can reap financial gain by taking on as many cars as possible (and sometimes holding them too long), or by serving as a storage facility when the ultimate receiver is not ready to accept a car, should liability be based on an unjust enrichment theory? The court rejected such an approach in Middle Atlantic, 353 F. Supp. at 1124, principally because it found no benefit to the warehouseman from holding rail cars. Is that finding valid?

The requirements of section 603 of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601, et seq., (RFA) do not apply to this action because, at this stage, it is an ANPR and not a "rule" as defined in section 601 of the RFA. Under the RFA, however, the Board must consider whether a proposed rule would have a significant economic impact on a substantial number of small entities. "Small entities" include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. If adoption of any rule likely to result from this ANPR could have a significant economic impact on a small entity within the meaning of the RFA, commenters should submit as part of their comments an explanation of how the business or organization falls within the definition of a small entity, and how and to what extent the comment-

er's business or organization could be affected. Following review of the comments received in response to this ANPR, if the Board promulgates a notice of proposed rulemaking regarding this matter, it will conduct the requisite analysis under the RFA.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Initial comments are due on January 24, 2011.

2. Reply comments are due on February 23, 2011.

3. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.

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No. 09-1212

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY
Petitioner,

v.

BILLY GROVES, INDIVIDUALLY, D.B.A., SAVANNAH RE-LOAD, SAVANNAH RE-LOAD, AND BRAMPTON ENTERPRISES, LLC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under rule 37.2 (b).[1]

[1] In accordance with Rule 37.2(a), AAR has provided notice of its intent to file this brief to counsel for petitioner and respondent. Petitioner has consented. The letter expressing consent has been filed with the Clerk of the Court. Respondent has refused consent.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR seeks leave to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad industry as a whole—and such requests have been granted in the past.[2]

This case, arising under the demurrage provisions of the Interstate Commerce Commission Termination Act ("ICCTA")[3], 49 U.S.C. §§10743, 10746, presents such an issue. For AAR's member railroads, which play a vital role in the Nation's economy through the transportation of goods in domestic and international commerce, the significance of this case goes well beyond resolution of the immediate dispute over which the parties are litigating. Because of the railroads' compelling need to ensure the efficient movement of railcars over the Nation's 140,000 mile rail transportation network, they have a strong interest in a resolution of the split among the Circuits, created by the Eleventh Circuit's decision below, over whether a party named in a bill of lading as the consignee of a movement of goods can be held presumptively liable under the provisions of the ICCTA for payment of demurrage charges resulting from delay by the named consignee, after acceptance of the delivered goods, in unloading and returning freight cars to the

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[2] *E.g., CSX Transp., Inc. v. Rivenburgh,* 129 S.Ct. 497 (2008); *Norfolk Southern Ry. Co., v. Sorrell,* 548 U.S. 938 (2006) (granting motion of AAR to participate as *amicus curiae*).

[3] The ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803, abolished the Interstate Commerce Commission ("ICC") and transferred many of its rail functions to the Surface Transportation Board (STB). The demurrage functions at issue in this proceeding which were formerly performed by the ICC are vested in the STB by virtue of 49 U.S.C. 10743, 10746, and 11122, as reenacted by the ICCTA.

national system, as provided for under the applicable carrier demurrage tariff.

If the consignee named by the shipper in the bill of lading as the party to whom the carrier is instructed to deliver the goods is not to be held presumptively liable under the ICCTA for demurrage charges after accepting the goods, but instead, in some additional manner, must have also "assented" to its status as consignee before it can be held liable for demurrage charges, as the Eleventh Circuit's decision would require, the uniform system of demurrage responsibility and liability under the ICCTA would be fractured and undermined.

When the AAR participates as *amicus curiae* in a case arising under the ICCTA it brings a broad, industry-wide perspective to the issue before the court. Significantly, the issue raised by this case will impact rail car movement and utilization, areas in which AAR has long been involved, primarily through administration and enforcement of industry car service rules that govern the movement of empty freight cars. AAR's expertise in this area is well-recognized. *See Investigation of Adequacy of Railroad Freight Car Ownership, Car Utilization, Distribution Rules, and Practices*, 362 I.C.C. 844, 873-76 (1980), in which the ICC rescinded it's car service rules and "return[ed] the car distribution power to the industry" in reliance on AAR's ability to enforce its own car service rules.

As a trade association representing the nation's major railroads, AAR can offer a broad perspective on the impact of the lower court's ruling by providing the industry's viewpoint, which often may be more expansive than that of the individual litigant, who may not be in a position to fully assess a case's impact on the industry as a whole. In this case, AAR

has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law essential to the efficient movement of freight across the national rail network is not misconstrued to the detriment of the railroad industry.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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May 10, 2010

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The interest of a*micus curiae* Association of American Railroads (AAR) is set forth in the attached Motion of the Association of American Railroads for Leave to File a Brief *Amicus Curiae*.[1]

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case of petitioner.

SUMMARY OF THE ARGUMENT

Because the rail freight system operates as a network, the basic operation of the demurrage scheme under the ICCTA for determining liability for undue detention of railcars must provide uniformity and certainty to carriers, car suppliers and the shipping community throughout the network if it is to operate effectively. The ICCTA, as well as the relevant case law before the Eleventh Circuit decision below, provided such uniformity and certainty by effectively establishing clear rules governing allocation of demurrage liability and by giving effect to the statutory language of 49 U.S.C. §10743. Section 10743 specifically governs the allocation of demurrage liability where, as in the case below, a consignee named in the bill of lading contends that it is not responsible for demurrage charges even though it accepted the goods (and was responsible for the demurrage).

Unlike the Third Circuit decision in *CSX Transp. Co. v Novolog Bucks County*, 502 F. 3d 247 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 1240 (2008) ("*Novolog*") the Eleventh Circuit decision below ignored the clear statutory terms of 49 U.S.C. §10743 and imposed an extra-statutory "assent" requirement upon the meaning of the term "consignee" that will create both lack of uniformity and uncertainty as to the applicability of demurrage charges to named consignees in carrier bills of lading to the detriment of the efficient movement of freight cars throughout the national rail network. The Eleventh Circuit's decision thus seriously undermines the effectiveness of demurrage

charges in promoting the efficiency of the Nation's rail network and warrants review by this Court to restore the uniformity and clarity of the law.

ARGUMENT

THE PETITION SHOULD BE GRANTED BECAUSE IT IS ESSENTIAL TO THE EFFICIENT FLOW OF THE NATION'S COMMERCE THAT THIS COURT RESOLVE THE SPLIT IN THE CIRCUIT COURTS CREATED BY THE DECISION BELOW AND CLARIFY THE PRESUMPTIVE STATUTORY LIABILITY OF A CONSIGNEE NAMED IN A BILL OF LADING FOR DEMURRAGE CHARGES

A. The Statutory Scheme Reflects the Critical Role of Demurrage Charges in Promoting the Adequate Supply and Efficient Flow of Railcars Over the Nation's Rail Network and Increasing the Capacity of the Rail Network to Meet Current and Future Shipper Needs

1. The Nation's rail freight system, including the supply and movement of freight cars, operates as a highly integrated network and the efficiency and capacity of the system relies on the efficient movement and prompt return of freight cars.

The U.S. freight rail system extends over approximately 140,000 miles of track owned and operated by privately-owned freight rail carriers (including petitioner Norfolk Southern Railway Company ("NS")). Although there are approximately 567 U.S. rail

freight carriers with various ownership or leased rights in individual lines of railroad track,[2] the U.S. rail freight system is highly integrated and operates as a network. Rail carriers must routinely interchange freight at established junction points to deliver goods in interline service to destinations that are not located on their lines. (Rail carriers also routinely provide "single-line" service over their own lines or other carriers' lines under negotiated lease or track use arrangements.)

The effective capacity and efficiency of the national rail system depends not only on the size of the network, but also on the availability and efficient movement of freight cars over that network. Because it is not economically feasible or practical for rail carriers to own all the railcars that would be necessary to adequately serve the shipping community at peak or high demand periods, the network's railcar fleet consists of railcars owned by freight carriers, private car leasing companies and the shipping community.[3] These cars are routinely interchanged over the rail network and their prompt availability to carriers and shippers when needed must be assured.[4] Adequacy of supply and efficiency of use of railcars

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[2] ASSOCIATION OF AMERICAN RAILROADS *Railroad Facts* 3 (2009 ed.).

[3] As of 2008, there were approximately 1.4 million freight cars in service. *Railroad Facts* at 51.

[4] Car shortages are normal occurrences in times of peak or unexpected demand (or national emergencies) and vary in duration and severity. Demurrage rules requiring prompt return of railcars is essential to meet carrier and shipper needs and prevent system-wide backups on the rail network. See *Car Demurrage Rules, Nationwide*, 350 I.C.C. 777, 787 (1975); *Alleghany-Ludlum Steel Corp.*, 406 U.S. 742, 745 (1972).

over the rail freight network is essential to ensure that the Nation's rail freight network operates efficiently and provides sufficient capacity to meet the current and future needs of the shipping community.

2. The ability of rail carriers to impose demurrage charges for the undue detention of railcars is essential to facilitate the efficient flow of commerce over the Nation's rail network and to provide sufficient network capacity to meet the current and future needs of the shipping community.

As Congress recognized from the early days of railroad regulation (and as was recognized at common law), the ability of a carrier to impose demurrage charges on a shipper or consignee for undue delay in loading or unloading freight cars is essential for the efficient movement of freight over the rail network. *Turner, Dennis & Lowry Lumber Co. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 271 U.S. 259, 262 (1926); *Pennsylvania R.R. Co. v. Kittaning Iron & Steel Mfg. Co.*, 253 U.S. 319, 323 (1920). Demurrage is a charge that both compensates rail carriers for the expenses incurred when rail cars are unduly detained by shippers or consignees for loading and unloading freight and serves as a penalty for undue car detention (to encourage the speedy return of rail cars to the rail network). See *Chrysler Corp. v. New York C. R. Co.*, 234 I.C.C. 755, 759 (1939); *Union Pacific Railroad Co. v. Ametek, Inc.*, 104 F.3d 558, 559 n. 2 (3d Cir.1997).

Because of its importance in facilitating an adequate car supply and promoting the efficient movement of railcars through the Nation's rail network,

demurrage has long been subject to regulation by the Surface Transportation Board ("STB") (and its predecessor agency, the Interstate Commerce Commission ("ICC")). See *Turner, Dennis & Lowry Lumber Co., supra*; *Pennsylvania R.R. Co. v. Kittaning Iron & Steel Mfg. Co., supra*. Under the ICCTA, carriers impose demurrage charges on shippers or consignees for undue delay in loading or unloading railcars to ensure that cars are not unduly detained or improperly used as storage facilities. As required by 49 U.S.C. §10746, carriers "shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to-(1) freight car use and distribution; and (2) maintenance of an adequate supply of freight cars to be available for transportation of property."[5]

3. The critical role of demurrage charges in ensuring efficient rail network flow is of increasing importance in today's period of existing and growing rail capacity constraints.

The existing national rail system is currently at or near capacity on several line segments and the rail industry must spend billions of dollars over the coming decades to expand network capacity to meet

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[5] Demurrage charges and terms are imposed pursuant to carrier tariff and are subject to the requirement, if challenged, that they be "reasonable" as determined by the STB. 49 U.S.C. §10702. Under the controlling NS tariff in this case, a consignee is allowed two days to unload freight without incurring demurrage charges. Pet. App. A at 23a-24a. Demurrage charges are generally assessed and retained by the railroad on whose line the cars are detained. See *South Carolina Rys. Com. v. Seaboard Coast L.R.*, 365 I.C.C. 274, 277 (1981).

the growing needs of domestic and international rail commerce.[6] Because an essential element in meeting the growing capacity needs of the rail shipping community is the more efficient use of railcars on the network, it is vital to the industry that its ability to impose and enforce demurrage charges for the undue detention of railcars throughout the national system not be impaired. A transportation disruption resulting from undue detention of railcars anywhere on the national system is not merely localized but has the potential to cause serious delays throughout the system.

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[6] See, e.g., *National Rail Freight Infrastructure Capacity and Investment Study (Cambridge Systematics)* (September 2007) (results of study indicating that approximately $148 billion must be invested over the next 30 years to increase rail freight capacity); see also *Supplemental Report to the U.S. Surface Transportation Board on Capacity and Infrastructure Investment (Christensen Associates, Inc.)* (released April 8, 2009) (available on STB website at http:www.stb.dot.gov.); *Freight Railroads, Industry Health Has Improved, But Concerns About Competition and Capacity Should Be Addressed* (October 2006) (GAO -07-94). The Surface Transportation Board has also instituted various proceedings and commissioned studies to examine the capacity needs of the railroad industry. *See, e.g.*, STB Ex Parte No. 671, *Rail Capacity and Infrastructure Requirements* (Notice of Public Hearing) (served March 6, 2007); STB Ex Parte No. 680 (Sub-No. 1) *Supplemental Report on Capacity and Infrastructure Investment* (served April 8, 2009).

B. The Decision Below Upsets the National Uniformity and Clarity of the Law Imposing Presumptive Liability for Demurrage Charges on a Consignee Named in a Bill of Lading and Will Create Uncertainty for the Railroad Industry in Applying Demurrage Charges to the Detriment of the Efficient Flow of Commerce Over the Rail Network

1. Prior to the Eleventh Circuit's decision below, the general rules governing allocation of liability for demurrage charges were effectively uniform, clear and provided certainty to carriers and the shipping community.

The bill of lading is "the basic transportation contract between the shipper-consignor and the carrier" and its terms and conditions "bind the shipper and all connecting carriers." *S. Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 342 (1982); *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247, 263 (3d Cir. 2007). The bill of lading, *inter alia*, instructs the carrier where to transport the goods and provides the carrier with the names of the shipper and the consignee. The consignee, in normal meaning and normal use throughout the rail industry (and as used by other transportation modes), is "[o]ne to whom goods are consigned." *Black's Law Dictionary* 327 (8th ed. 2004).[7] The carrier has a legal

[7] The Eleventh Circuit decision below specifically noted that the above was the normal meaning of the term "consignee" and that both the Federal Bills of Lading Act (49 U.S.C. §80101 (1)) ("'consignee' means the person named in a bill of lading as the

obligation to transport the shipment to the consignee named in the bill of lading. *Novolog*, 502 F.3d at 259.

Until the Eleventh Circuit's decision below, the law was clear that a consignee named in the bill of lading becomes a party to the transportation contract, and is bound by it, when it accepts the freight.[8] The law was also clear that a consignee named in a bill of lading who is responsible for undue delay in unloading goods and returning rail cars to the national rail system is liable for demurrage charges set forth in a carrier's demurrage tariff.[9]

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person to whom the goods are to be delivered'") and NS's demurrage tariff defined consignee in a consistent manner. See Pet. App. A at 5a, n.3.

[8] *Novolog*, 502 F.3d at 254-255 (citing, *inter alia*, *Louisville & Nashville Ry. Co. v. Central Iron & Coal Co.*, 265 U.S. 59, 70 (1924) ("if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, whether they are demanded at the time of delivery, or not until later"); *see also Pittsburgh v Fink*, 250 U.S. 577, 581 (1919) ("The weight of authority seems to be that the consignee is prima facie liable for the payment of the freight charges when he accepts the goods from the carrier.").

[9] *Middle Atl. Conference v. United States*, 353 F.Supp. 1109, 1118 (D.D.C.1972) (three-judge panel); *Novolog*, 502 F.3d at 254-255 (3d Cir. 2007). The AAR recognizes that there exists language in *Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813 (7th Cir. 2003) (and a small number of district court decisions) that the Eleventh Circuit cited in support of its decision. See Pet. App. A at 14a, 19a-20a. Until the Eleventh Circuit's decision, however, there was no actual split in the circuits on the issue decided below and no serious challenge to the demurrage system as long interpreted by the courts and the STB/ICC. See Brief of Petitioner at 24, n. 19. The Eleventh Circuit itself noted that its "research has disclosed very few opinions by federal circuit courts dealing with the narrow issue presented in this case." Pet. App. A at 9a, n. 4.

2. The Eleventh Circuit decision, in failing to properly apply the requirements of 49 U.S.C. §10743 to the case below, upset the uniformity of the law imposing presumptive liability for demurrage charges on a consignee named in the bill of lading and created a split in the circuits on the issue that must be resolved by this Court.

The Eleventh Circuit, in purporting to properly construe the term "consignee" as applied to the facts alleged by respondent in the case below, basically redefined the term by adding a new requirement of "assent." In so doing, the Eleventh Circuit not only effectively ignored the specific statutory provision that precisely addresses the issue (49 U.S.C. §10743) but also created a split in the circuits as well as great uncertainty in the law governing demurrage charges that must be resolved by this Court.

In both *Novolog* and the instant case, a rail carrier sought to impose demurrage charges on a transloader/warehouseman (reloader) of freight named as consignee on the bill of lading resulting from the named consignee's undue detention of railcars for unloading. In both cases, the named consignee claimed it was not liable for the demurrage charges, even though it accepted the goods delivered by the carrier, because it was not a party to the bill of lading and had not authorized the shipper to name it as consignee. *Novolog*, 502 F.3d at 257; Pet. App. A at 7a. In deciding the respective cases, the Third Circuit and the Eleventh Circuit reached diametrically opposing results.

The *Novolog* court held that the case was specifically governed by the "consignee-agent liability provisions" of the ICCTA (49 U.S.C. §10743), which "appears designed to address precisely the . . . situation where a carrier assesses charges after delivery against the named consignee and recipient of the freight, but the consignee/recipient contests its liability for the charges on the grounds that it is a mere middleman." *Id.* at 256.[10]

The *Novolog* court found that the specific requirements of the consignee-agent liability provisions of the ICCTA controlled and that the "requirements were not burdensome: the consignee agent is obligated merely to notify the carrier, in writing, of the agency relationship" in advance of accepting the goods. *Id.* at 255-56. The *Novolog* court also found that "to hold that the documented designation of an

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[10] Section 49 U.S.C. §10743 (a) (1) provides as follows:

> "Liability for payment of rates for transportation for a shipment of property by a shipper or consignor to a consignee other than the shipper or consignor, is determined under this subsection when the transportation is provided by a rail carrier under this part. *When the shipper or consignor instructs the rail carrier transporting the property to deliver it to a consignee that is an agent only, not having beneficial title to the property, the consignee is liable for rates billed at the time of delivery for which the consignee is otherwise liable, but not for additional rates that may be found to be due after delivery if the consignee gives written notice to the delivering carrier before delivery of the property—*
>
> *(A) of the agency and absence of beneficial title; and*
>
> *(B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading." (emphasis added).*

entity as a consignee and that entity's acceptance of the freight is insufficient to hold it presumptively liable for demurrage charges would frustrate the plain intent of the statute, which is to establish clear, easily enforceable rules for liability." *Id.* at 257.

In contrast to *Novolog*, the Eleventh Circuit in its decision below found that the consignee-agent provisions of 49 U.S.C. §10743 were simply not applicable. As grounds for so finding, the Eleventh Circuit effectively rejected the normal definition of "consignee" ("the party designated to receive a shipment of goods") as long-used in the case law and found that the warehouseman/reloader named as consignee in the bill of lading was not in fact a consignee because it had not consented to be named as consignee in the bill of lading. Pet. App A at 18a-19a. As held by the court below: "[A] party must assent to being named as a consignee on the bill of lading to be held liable as such, or at the least, be given notice that it is being named as a consignee in order that it might object or act accordingly." Pet. App. A at 19a.

3. The Eleventh Circuit decision below not only creates a split in the circuits on the issue of a named consignee's presumptive liability for demurrage charges which this Court must address, but also creates uncertainty and provides conflicting guidance to the railroad industry as to the applicability of demurrage charges to parties named in bills of lading as consignees.

The Eleventh Circuit, in reaching its decision, effectively turned the rules of demurrage on its head and created the potential for confusion in the applica-

tion of demurrage charges not only in the Eleventh Circuit but throughout the national rail system. Under the long-established case law and the provisions of 49 U.S.C. §10743, it is the *carrier* that must be notified by the *consignee* named on the bill of lading ("the party to whom the goods are consigned") of the consignee's alleged agency relationship (with disclosure of the named principal) prior to the consignee's acceptance of the goods, in order for the alleged consignee-agent to avoid demurrage charges imposed under the carrier's tariff.[11] The carrier is in no position, and under no common law or ICCTA obligation, to question or ascertain whether the named consignee in a bill of lading actually "consented" to be named as consignee before delivering the goods, and can only rely on the named consignee's acceptance of the goods without objection as proof of its consignee status. Unless notified otherwise, the carrier is entitled to presume that the named consignee is in fact the consignee and will pay any demurrage charges that accrue.

Indeed, this is the only rule that can work effectively in practice without creating serious confusion. The carrier itself plays no legal role in determining

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[11] *See, Middle Atl. Conference*, 353 F.Supp. at 1120-21 ("The law is well settled that an agent for a disclosed principal is not liable to a third person for acts within the scope of agency."); *R. Franklin Unger, Trustee of the Ind. Hi-Rail Corp., Debtor-Petition for Declaratory Order-Assessment and Collection of Demurrage of Switching Charges*, STB Docket No. 42030, 2000 STB Lexis 333, n. 13 ("demurrage and detention charges . . . do not apply to agents acting for the principal parties to the transportation [if] the agency relationship [is] disclosed"). The Eleventh Circuit's decision expressly recognizes that this common law rule of agency is reflected in the provisions of 49 USC §10743 (a)(1). Pet. App. A at 12a-13a.

the agency status of the named consignee and it cannot be held responsible for second-guessing the designation on the bill of lading. As instructed by the bill of lading and as required under the terms of the carrier's demurrage tariff, the carrier has a legal obligation under the ICCTA both to deliver the goods to the named consignee and to impose demurrage charges on the named consignee pursuant to the tariff's terms.[12] Nonetheless, under the Eleventh Circuit's ruling, carriers may come to find, after the goods have been delivered and accepted, that the named consignee has no intention of paying the demurrage charges. Carriers should not be left in a state of uncertainty as to their ability to impose demurrage charges under circumstances over which they have no control.

Moreover, as found by the *Novolog* court, the burden imposed on an alleged agent-consignee by the advance written notice requirement of 49 U.S.C. §10743 is minimal. Only the alleged agent-consignee named as consignee in a bill of lading is aware of its putative agent-consignee status prior to its acceptance of the goods delivered by the carrier. *In virtually all cases, moreover, the alleged agent-consignee has specific advance notice from the carrier, prior to the delivery of the goods, as to the origin and nature of the goods, when the goods are ready for delivery to the alleged agent-carrier's facility and that the recipient of the notice is the party designated by the shipper to receive the goods.* Prior to its acceptance of

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[12] The Eleventh Circuit's decision expressly recognizes these carrier obligations ("Norfolk is required by the ICCTA and the terms of its own tariff to assess demurrage charges against the shipment's consignee for any delay in unloading the rail cars at their destination."). Pet. App A at 6a.

the goods, the alleged agent-consignee thus has ample time to inform the carrier of its agent status as to specific shipments (and disclose the name of its principal) so that the carrier is in a position to ascertain (and confirm if necessary) the party liable for demurrage charges. Indeed, the Eleventh Circuit's decision itself specifically notes that "[b]efore rail cars were delivered, Norfolk would notify Savannah [respondent] that rail cars from certain shippers had arrived and were ready for delivery." Pet. App. A at 3a – 4a. The named consignee thus had ample time in this proceeding to simply notify the carrier as to its alleged agent-consignee status with respect to such shipments and simply declined to do so.[13]

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[13] Under standard industry practice, moreover, specific delivery arrangements are normally made by carriers and consignees (including agent/consignees) far in advance of actual delivery, and communication between the parties regarding the status of a specific shipment is ongoing prior to delivery. For example, a specific recipient (the party to whom the rail cars will be physically delivered) may issue general pre-delivery instructions to a carrier to deliver cars from a specific shipper after arrival in the carrier's destination terminal on the first available train to the recipient's facilities to the extent there are sufficient spots for the cars (e.g., "spot on arrival" instructions). Under such instructions, if the number of cars arriving at the carrier's destination terminal exceed the amount of spots then available at the recipient's facilities (a fact known by the carrier's local agent), the carrier would keep the remaining cars at its destination yard in "constructive placement" to be delivered when spots are available. Another recipient may generally instruct the carrier to store arriving cars in constructive placement in the carrier's destination rail yard awaiting further delivery instructions from the recipient (e.g. "order in" instructions). It is thus a simple matter for a receiving facility—including a transloader or warehouseman/reloader—to notify the carrier in advance of delivery of a shipment as to its "consignee" or "agent" status as to a particular carload of freight.

In contrast, the Eleventh Circuit's decision below not only places serious burdens on the ability of rail carriers to apply demurrage charges on a uniform basis throughout the national rail system, it provides no incentive for named consignees such as trans-loaders/warehousemen (or indeed any other consignees who can claim that they never "consented" to be named as consignees in the bill of lading) to comply with their obligation to promptly unload and return rail cars to the national system. The Eleventh Circuit's decision seriously undermines the effectiveness of demurrage charges in promoting the efficiency of the Nation's rail network and warrants review by this Court to restore the uniformity and clarity of the law.

CONCLUSION

For the foregoing reason, the petition for certiorari should be granted.

Respectfully submitted,

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